THE PRINCIPLE OF BEST PROTECTION

A Viable Solution to Norm Conflicts between International Humanitarian Law and Human Rights Law?

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Content

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1 Introduction

Although international humanitarian law (IHL) and international human rights law (IHRL) are both about providing as good protection against harm as possible to those subjected to it, their application does not always point to the same legal result. If there is a situation where a norm of humanitarian law (IHL) and a norm of international human rights law (IHRL) both apply at the same time to the same specific issue, confusion often arises in cases where there is an apparent norm conflict. How should then the interaction of the two regimes be settled? Answer to this question is often unclear both from the legal and policy perspective and different solutions have been advanced both by different judicial (and quasi-judicial) bodies and scholars.[1] If one proceeds from the premise that both IHL and IHRL seek to give to individuals as best protection as possible then, as some held at a conference organized by the ICRC, "the interest of the victims would dictate the application of the highest protection in the event of antinomy."[2] For example,[3] IHL, in contrast to IHRL, provides for a higher standard of protection when it comes to torture as it proscribes torture even in cases where no public officials are involved. According to the principle of best protection, the IHL norm should therefore trump the competing IHRL norm. However, when it comes to issues most pertinent to armed conflicts, such as deprivation of life and detention, it is the respective norms of IHRL that provide for higher protective standard than the competing norms of IHL. In these cases then, it should be the respective norms of IHRL that should prevail according to the principle. Hence it is always the norm which provides the highest standard of protection that should trump the other competing one. This principle will therefore be referred to here as the principle of best protection.

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[1] For an overview see: Larsen (2010) 260-276.

[2] ICRC (2003) 8.

[3] The following examples are elaborated and analyzed in more detail further bellow (section 3.2.1.2 *infra*).

The principle of best protection is often confused with complementarity theory.[4] While the principle proceeds from the assumption that there is a norm conflict, the complementarity theory proceeds from the assumption that there is no such conflict. Hence, while the principle of best protection simply *replaces* a 'weaker' norm by a 'stronger' one, the complementarity theory provides for *synergies* between norms of the both regimes.[5]

The principle of best protection was heavily criticized because it would "lead to conclusions that could sometimes be open to question."[6] The literature reviewed in this thesis mentions several problems relevant to IHL-IHRL interaction generally. Most often mentioned problems include (i.) systemic deficiency of the resulting applicable standard which would induce non-compliance[7]; (ii.) lack of specificity of purportedly higher standards of protection[8]; (iii.) unreasonably high operational demands that would result from application of standards inappropriate to given circumstances[9]; and (iv.) several possible unintended consequences that could, allegedly, be destructive of, or have a negative impact on, one or the other legal regime as such[10]. Nevertheless, these concerns are almost always mentioned in passing and lack systematic treatment. The thesis seeks to address this gap by critically assessing these concerns separately for international armed conflicts (IAC) and non-international armed conflicts (NIAC)[11] in relation to the principle of best protection.

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[4] The distinction between the "most favourable protection of victims theory" and "complementarity theory" has been noted by Larsen (2010) 273.

[5] Limitation constrains do not allow for a closer examination of the complementarity theory here. For a succinct overview see: Ibid. 272-273.

[6] ICRC (2003) 8.

[7] See, e.g., discussion whether compliance mechanisms of one regime could work within the framework of another by Provost (2002) 116-117.

[8] E.g., Doswald-Beck and Vite (1993) passim; Feinstein (2005) 301; UN Commission on Human Rights (1998) para. 49.

[9] E.g., Prud'homme (2007) 358; Schabas (2007) 593; Sassoli and Olson (2008) 609; Larsen (2010) 273-274.

[10] E.g., Draper (1979) passim; Schabas (2007) passim; Verdirame (2008) 691; Bowring (2010) passim; Milanovic (2010) 462.

[11] While IAC are fought between States, NIAC are either fought between (i.) State and one (or several) armed groups or (ii.) between such groups. When it comes to NIAC, the thesis will only deal with the former.

The question to be pursued in the thesis is then the following: Is there a trend in international law practice that gives support for the principle of best protection and, more importantly, is the principle viable given the concerns (i.-iv.) identified above? The expression 'identifiable trend' implies critical exploration of the relevant practice of international judicial (and quasi-judicial)[12] bodies. The main emphasis is placed on the second part of the question, however. Here, policy arguments shall be given primary consideration.

The core argument is that, although the principle of best protection is not well supported under *lex lata* analysis, further considerations under *lex ferenda* support its application in non-extraterritorial NIAC. Under *lex lata* analysis, recent trends do not point to one specific use of the principle. This makes it unlikely the principle would establish itself as a clear solution guiding the IHL-IHRL relationship. In terms of *lex ferenda*, it would be unrealistic to apply the principle to international armed conflicts (IAC). In non-international armed conflicts (NIAC), however, the situation is more complex. Pursuant to systematic analysis, an argument is made that the application of the principle to NIAC, is neither entirely unrealistic nor necessarily destructive of the two legal regimes.

Before delving into the issue itself, the introduction will locate the problem within broader context of what has been termed as fragmentation of international law; discuss the issue of what actually constitutes norm conflict; outline opposing readings of the relation between IHL and IHRL from historical and conceptual perspectives; and finally, look at the nature of general principles of law in relation to norm conflict.

1.1 Fragmentation of International Law

The problem of conflicting norms has been discussed in connection with the so-called process of 'fragmentation' of international law. As international law is not a single homogenous legal order, or so the argument goes, its continuous diversification and expansion increases the risk that States "have to comply with mutually exclusive

[12] By quasi-judicial bodies is meant human rights treaty bodies conclusions of which are authoritative but not legally binding.

obligations."[13] Nevertheless, although posing difficulties, the actual impact of fragmentation has not been found very serious[14] and, indeed, some scholars find it fruitful to talk about 'constitutionalization' of international law instead.[15]

There is also another sense in which 'fragmentation' is described which refers to creation of structurally biased areas of expertise (e.g., trade law, environmental law, human rights law) which cater to audiences with special interests and ethos.[16] It follows from this that one can expect attempts at defining relationships between two specialized regimes to be surrounded by controversy.

The debate about fragmentation is often not strictly of a legal nature and more theoretically oriented approaches remain important. Theoretical investigation, so far as it remains directly relevant to IHL-IHRL interaction, will be a crucial, but not exclusive, approach employed in this thesis. Other approaches will be positivist legal approach (mainly the first part) and policy oriented approach (second part). One of theoretical problems presents itself right in the beginning. When can we actually talk about norm conflict?

1.2 The Nature of Norm Conflicts in Public International Law

What it exactly means for norms 'to be in conflict' is a question that, on the one hand, has no settled answer and, on the other, the way it is answered has serious legal implications. Before delving into the problem, however, some preliminary issues need to be sorted out.

First of all, 'norm conflict' has to be distinguished from what is called 'conflict of laws' which is just a different name for private international law dealing with conflicting domestic laws.[17] In public international law 'norm conflict' refers to situation where two different norms contained in sources of international law enjoying the same hierarchical standing (e.g., treaty versus treaty or a treaty versus custom) are in apparent conflict with

[13] Hafner (2000) 144.

[14] Koskenniemi (2006).

[15] See, e.g., Klabbers, Peters and Ulfstein (2009).

[16] Koskenniemi (2009) 9; See also Fischer-Lescano and Teubner (2004).

[17] For recent analysis as to how relevant the rules of conflict of laws could be for public international law see: Michaels and Pauwelyn (2011).

each other. Second, as will be pointed out later, conflict of norms does not necessarily imply conflict of entire regimes.[18] In other words, in case of law creating treaties (that is treaties that set up legal regimes in contrast to treaties that are intended for just a single-issue operation), it is specific clauses that should be understood as being in conflict rather than entire treaties.

Within the academic field of public international law, the dominant view is that norm conflict only means a situation where a party to two treaties "cannot simultaneously comply with its obligations under both treaties"[19]. The implication here is that if a State is party to one treaty that allows certain conduct (i.e., creates a right for the State) and, at the same time, to another treaty that prohibits the same conduct (i.e., imposes obligation on the State), there will be no conflict to solve. State can (and should) successfully comply with both treaties by refraining from exercising the right vested in the first treaty and, simultaneously, by complying with the obligation imposed by the second. Hence, as noted by Pauwelin, this view implicitly creates hierarchy in the law of treaties where, in respect to the same conduct, those containing prohibitions always trump those that contain permissions.[20] For some, this problem serves as justification to propose a broader definition of norm conflict. Hence Pauwelyn, defines norm conflict as a situation when, "one norm constitutes, has led to, or may lead to, breach of another"[21].

Decision in favour of narrow or broad definition of norm conflict depends then largely on persuasiveness of policy arguments influenced, *inter alia*, by ones conception of the international legal order where a constitutionalist will tend to adopt the narrow one.[22] When applying a principle intended to solve norm conflict, it will be important to be conscious of the fact that the decision over what counts as norm conflict interferes with the operation that is, supposedly, reserved for the principle.

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[18] Campanelli (2008) 657.

[19] Jenks (1953) 426.

[20] Pauwelyn (2009) 184-188.

[21] Ibid. 175-176; This approach is also used in Milanovic (2009) 72; Milanovic (2010) 465.

[22] For defence of the prevailing view see: Marceau, (2001). For a critical rebuttal see: Vranes, (2006), 405.

Irrespective of which of the two methods is applied to identify whether there is a norm conflict, neither method determines whether the conflict is merely an apparent one or a genuine one. The conflict will be genuine if the terms of a provision of one treaty are not flexible enough to be accommodated with the terms of a provision of the other treaty. In that case solution can not be achieved by interpretative means and must be instead resolved in favour of either one or the other norm.[23] The question then arises whether the principle seeks merely to accommodate apparent norm conflicts or whether it seeks to resolve genuine norm conflicts. Before looking more closely on principles, however, it is important to consider the specificities of norm conflicts between the IHL and IHRL.

1.3 The Nature of Norm Conflicts between IHL and IHRL

In the following subsections two contrary positions will be presented. On the one hand, it is often argued that the two bodies of law evolved separately and follow a different logic and that trying to impose norms of one into the domain of another is a futile, and possibly also dangerous, exercise. On the other hand, however, it is also often argued that there has been a period of convergence of the two regimes and that conceptually there is an overlap in purpose. This latter line of reasoning goes on to advance the view that applying norms from both regimes concurrently is a worthwhile exercise resulting in an improvement of protection. The core of the two positions is presented bellow. It should be noted, however, that the issue is much more complex than the theoretical division into two positions allows. It was rightly argued that between the two regimes "similitude and correspondence are sometimes overwhelmed by diversity, and […] gaps and overlaps between their rules are a common feature of their interrelations"[24]. Therefore, this section should only be read as a starting point to better understand the various concerns discussed in the *lex ferenda* section.

[23] Milanovic (2010) 9.

[24] Vinuesa (1998) 70.

1.3.1 IHL and IHRL as Separate Regimes

Painting IHL and IHRL as different and separate is not just an innocent academic exercise but can serve various purposes with serious political implications.[25] One the one hand, it can serve to advance arguments against applicability of human rights during the times of armed conflict. On the other hand, it can also serve to highlight certain problems of such application while admitting for this possibility. As well predicted by more sociologically oriented studies of fragmentation,[26] by pointing at differences, the authors may warn against what they perceive as dangerous intrusion of IHL into the domain of IHRL[27] or, vice versa, as dangerous intrusion of IHRL into the domain of IHL.[28] This section will briefly outline historical and conceptual arguments that are usually invoked in order to buttress these concerns.

1.3.1.1 History of Opposition

Supporting the claim that IHL and IHRL are distinct is usually done by reading their history as disconnected and separate. Rules limiting conduct of warfare are said to go back at least to the idea of chivalry in the Middle Ages or even much earlier.[29] Human rights, on the other hand, are said only to emerge on the domestic level in the Age of Enlightenment.[30] Furthermore it was only after the Second World War that human rights have entered international domain.

One can also mention here the history of competitive relationship between the UN and the ICRC. On the one side the ICRC, which saw the UN and human rights as highly

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[25] From a linear narrative of different evolution of the IHL and IHRL regimes Barry Feinstein, for example, derives conceptual difference of the regimes. This then serves to support his arguments in regards to legality of the Palestinian security barrier, see: Feinstein (2005).

[26] See footnote 16.

[27] E.g., Bowring (2010).

[28] E.g., Draper (1979).

[29] Ober (1994).

[30] E.g., the 1628 Petition of Rights , the 1679 Habeas Corpus Act and the 1689 Bill of Rights in the UK; the 1776 Virginia Bill of Rights in the US; the 1789 Declaration of the Rights of Man and of the Citizen in France.

politicized, decided to exercise greatest care to preserve its "non-political character."[31] On the other side the International Law Commission, established by the UN and entrusted to promote progressive development and codification of international law, excluded laws of war from its work in fear it might otherwise signal "lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace".[32] As a result, the 1949 GCI-GCIV[33] and the 1948 UDHR contain no reference to each other.[34]

1.3.1.2 Difference in Logic

When it comes to provision of protection, the main conceptual difference between IHL and IHRL is the design by which they provide it. In respect to individuals, IHRL affords rights which are expected to be safeguard by acting through judicial system. IHL, presupposing breakdown of institutions, rather imposes individual obligations at those who poses power over persons in need of protection.[35]

In respect to NIAC it is also important to mention the fact that while IHRL imposes direct obligations only on States,[36] IHL is directly binding also in respect to non-State actors.[37] Hence, while there is room for positive effects in terms of compliance arising from immediate reciprocity in IHL,[38] under IHRL reciprocity in this sense can not exist.

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[31] ICRC (1948) 92 res. XVIII; See also accusations that UN was politicizing IHL by inserting language of IHRL: Draper (1979) 194-195.

[32] ILC (1949) 281 par. 18.

[33] Only abbreviations of treaties are used throughout the text. For full citations please consult bibliography.

[34] Kolb (1998) 409.

[35] Provost (2000), 16-117; 344-345; Sassoli and Bouvier (2006) 348-349.

[36] From a legal positivist view this remains the case although the issue of application of IHRL to non-state actors is becoming increasingly challenged. Two more things should be mentioned however. First, it is uncontested that non-State actors are bound indirectly by human rights obligations through domestic law which remains binding. Second, even if one agreed that non-state actors are bound directly by IHRL, some of these obligations can only be implemented by States. For an overview of the relevant literature see: Clapham (2006).

[37] Zegveld (2002).

[38] Nevertheless, in respect to NIAC there remain problems with what Provost has called systemic reciprocity – that is reciprocity where equality of participants leads to equal interest towards preservation of the

One of the ways in which the systemic difference of IHL and IHRL manifests itself has been described as 'linguistic.'[39] Of special concern is the usage of the same term which, under each of the two bodies of law, denotes essentially a very different concept. An often cited example is the term 'proportionality' which is considered as one of the core principles under both IHL and IHRL. Under IHRL the principle of proportionality requires that a State agent, while following a legitimate aim, may in respect to an individual use only as much force as is absolutely necessary.[40] In contrast, under IHL proportionality requires that an assessment be made considering, on the one side, expected collateral damage and, on the other side, anticipated military advantage. Collateral damage then shall not be excessive in respect to military advantage.[41] Hence, while under IHRL States are obliged to minimize force as much as possible, there is no such requirement under classic IHL[42] where, as long as military advantage is gained, the loss of human lives is acceptable if militarily feasible precautions[43] are taken. Furthermore, while under IHRL any use of force has to strictly follow a legitimate aim, under IHL legitimacy of aim (i.e., the purpose of gaining the military advantage in the first place) is irrelevant as the whole body of IHL is predicated upon the idea of separation between *jus in bello* and *jus ad bellum*.[44]

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normative system – which remains a force behind non compliance with IHL. See: Provost (2002) 122, 161-162.

[39] Lubell (2005) 744-746.

[40] Under ECHR this follows from the article 2(2) that allows for IHL logic only after derogation under article 15(2), something which has never been done in practice. Under ICCPR this follows from interpreting the term 'arbitrary' in article 6(1) in conformity with UDHR (Art. 29) and soft law standards which, however, only apply to military as far as they conduct police powers. See: *Code of Conduct for Law Enforcement Officials* (1979); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990).

[41] Art. 51(5)(b) AP I. IHL does not give precise criteria by which to determine what constitutes military advantage. Hence the determination is largely left to commander's discretion. It is also important to stress here that military advantage can only be of *in bello* character and not, for example, to rescue of civilians.

[42] As will be explained later, there has been a push towards the standard requiring no more than necessary use of force even under IHL. Nevertheless, as Arne Willy Dahl has remarked, the situation on the battlefield will normally require use of superrior power, see: Dahl (2003) 26.

[43] Art. 57(2)(a)(ii) AP I.

[44] On the importance of the separation between the jus ad bellum and *jus in bello* see e.g., Sassoli (2007).

The reason for the difference of the two approaches in respect to the use of force is simple. While IHRL seeks to regulate unequal relationship between State and its citizens, IHL seeks to minimize the scourge of war by equally subjecting belligerents to one common set of rules irrespective of whose aim is legitimate.

1.3.2 IHL and IHRL as Converging Regimes

The laws of war, today called humanitarian law,[45] did not entirely escape the influence of human rights.[46] It is argued that in the course of recent past there has been a process of convergence of the two regimes "that has been substantial, both with regard to concept and the field of application".[47] This line of reasoning is intended to enhance protection by, *inter alia*, removing protection gaps where neither IHL nor IHRL has reach;[48] to enhance existing protection under IHL and IHRL through interpretation of certain norms in light of one another;[49] or by the desire to apply the highest standard of protection.[50] That other political motives with serious implications are often involved is also beyond doubt.[51]

1.3.2.1 History of Mutual Influence

The beginning of the period of convergence is usually attributed to the year 1968 Teheran Conference where the aim was to increase protection of the human person also in times of

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[45] In the past, the body of law regulating the conduct of hostilities was known as 'the laws and customs of war.' Today it is referred to as International Humanitarian Law (IHL) – a name suggesting influence by human rights movement. Nevertheless, some also use the name 'Laws of Armed Conflict (LOAC).' See: Dinstein, (2004) 12-14.

[46] For a detailed study on this issue see: Meron (2000).

[47] Eide (1984) 695.

[48] Consider, for example, the article 10(1) ICCPR ensuring humane treatment of detainees that is not listed as non-derogable under article 4(2). While derogations are allowed only in time of "public emergency", this does not mean that IHL is automatically applicable unless the threshold of "armed conflict" is reached. See: Eide, Rosas and Meron (1995); Turku Declaration, *Declaration of Minimum Humanitarian Standards* (1991).

[49] E.g., Droege (2007); Quénivet (2008); Sassoli and Olson (2008).

[50] E.g., Naftali and Michaeli (2003).

[51] See the charges of political motivations made by Draper in respect to the resolutions adopted at the 1968 Teheran Conference (see footnote 31).

armed conflict.[52] The process continued with the adoption of the two additional protocols to Geneva Conventions in 1977 which, at least in some respects such as detention, were directly inspired by the International Covenant of Civil and Political Rights.[53]

Conversely, human rights instruments also started to be influenced by humanitarian law. The CRC, by substance and supervisory mechanism clearly a human rights instrument, set down a rule expressly applicable in armed conflicts in respect of recruitment of children.[54] This trend has continued until today and it is visible, for example, in various resolutions by the Security Council.[55]

1.3.2.2 Overlap in Purpose

While one can concede that IHL and IHRL operate under different logics, it is also true that the two regimes overlap in purpose concerning the aim to give to individuals as best protection as possible. While in respect of IHRL this fact is hardly disputable, in respect of IHL it is often asserted that the latter regime constitutes "a compromise based on a balance between military necessity, on the one hand, and the requirements of the humanity, on the other'.[56] Nevertheless, it is sometimes cautioned that the view of IHL as a 'balance' where considerations of humanity are necessarily offset by considerations of military necessity is not precise.[57] Nils Melzer, among others[58], advanced the view that the principle of necessity has a restrictive function itself[59] and went as far as to argue that even combatants can not be killed where they can be captured "without additional risk to operating

[52] International Conference on Human Rights (1968); UNGA Res. 2444 (1968). Note that the titles of the resolutions seem to be confusing IHL as simply being a special branch of IHRL.

[53] Compare, for example, articles 14, 15 and 16 of ICCPR with article 75 AP I and articles 4, 5 and 6 AP II.

[54] Art. 38 CRC, see also the optional protocol of 2000 entitled "Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict."

[55] See, e.g., UNSC Res. 1325 (2000) [on the protection of women in armed conflict]; UNSC Res. 1894 (2009) [on the protection of civilians in armed conflict]; UNSC Res. 1998 (2011) [on the protection of children in armed conflict].

[56] Sandoz, Swinarski and Zimmermann (1987), Art. 35 AP I, para. 1389; See also: Watkin (2004) 9.

[57] For a nuanced analysis of military necessity see: Hayashi (2010).

[58] An early influential proponent of this view was Meyrowitz (1994).

[59] E.g., Melzer (2008) 286-288.

forces".[60] The same suggestion was reiterated in recent ICRC guidelines written by the same author.[61] The problem with this view is that it relies on military necessity as a principle of humanitarian law rather than treaty law (where it was intentionally omitted) or customary law (the ICRC customary study does not contain it as an individual rule). Not only is this view legally contentious, it has simply not been "translated into actual battlefield instructions, even less into actual battlefield behaviour".[62]

Nevertheless, the importance of humanitarian considerations in IHL should not be underestimated. It was mostly reflected in the adoption of the GC IV that aims at protection of civilians. Some provisions of Geneva Conventions do not only impose obligations but also speak of rights that not even the protected persons themselves could renounce (Art. 7 GC I –GC III; 8 GC IV).[63] A special mentions of the article 3 common to all Geneva Conventions (hereinafter CA 3) should also be made. In words of one author this provision constitutes "a kind of human rights provision"[64] as it addresses the relationship between individual and State.[65]

To what extent this partial overlap in purpose of the two regimes could translate into an integrated system of protection depends also on the means by which relationships between competing norms are regulated. The next section is devoted, therefore, to discussion of basic principles that have been widely used for this purpose albeit until recently mostly in other contexts.

1.4 Principles as Solutions to Norm Conflicts

The existence of the notion of 'general principles of law' as one of the valid sources of public international law is today undisputed. It is routinely derived from the article 38(c) of

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[60] Melzer (2008) 288; for an opposite view see: Watkin (2005) 148.

[61] ICRC (2009) 80-82.

[62] Sassoli and Olson (2008) 606.

[63] Nevertheless, the underlying rationale for affording inalienable rights under IHL differs from that under IHRL.

[64] Schindler (2003) 171.

[65] This description is not exactly accurate as State must not necessarily be Party to the armed conflict for the CA 3 to apply.

the Statute of the International Court of Justice which, as an annex, forms integral part of the UN Charter. This is despite the fact that, strictly speaking, the article is only binding for the Court.

The ICJ statute, however, leaves the meaning of the term 'general principles of law' unclear. The classic view is that general principles embody principles of private and public law administered in domestic courts[66] where such principles are both widely shared among countries representing all the main legal systems of the world[67] and where they are applicable to international relations.[68] Nevertheless the term is used in different ways.[69]

In modern doctrine, general principles tend to be understood as also encompassing principles reflected on a widespread basis in State practice on the international plane, discernible as abstractions from numerous international treaties or other standard-setting documents, or which are necessary as logical propositions of legal reasoning (e.g., equality of States). Brownlie categorizes these as principles of international law.[70]

When it comes to regulation of relations between norms possessing equal rank, three general principles are recognized as present in all domestic legal systems.[71] First, *lex posterior derogat priori* (a later law repeals an earlier one). Second, *lex posterior generalis non derogat priori speciali* (a later law, general in character, does not derogate from an earlier one, which is special in character). And third, *lex specialis derogat generali* (a special law prevails over a general law). As is apparent, these principles have a form of

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[66] Brierly, (1963) 57-63.

[67] The article 38(1)(c) of the ICJ statute, in a language still somewhat influenced by colonialism, requires general principles of law to be "recognized by civilized nations" while the more recent ICC statute allows the Court to derive general principles of law from "national laws of legal systems of the world" (Art. 21(1)(c)).

[68] Oppenheim (1955) 29.

[69] In literature there is tendency to use the term 'principle' to denote custom. Even the ICC statute, for example, does not use the term customary law but rather makes distinction between "principles and rules of international law, including the established principles of the international law of armed conflict" (Art. 21(1)(b)) and "general principles of law derived by the court from national laws of legal systems of the world" (Art. 21(1)(c)).

[70] Brownlie (2008) 19; See also: Koskenniemi (2000).

[71] Cassese (2005) 154.

short maxims which are not intended to provide comprehensive solution to legal problems. At best, they provide a vague guidance that may or may not be useful in a given case.

In public international law, *lex posterior*, being reflected in VCLT (Art. 30) is relatively clear and uncontested. Nevertheless, it is completely irrelevant when it comes to IHL-IHRL relationship as both areas of law were developed at different points in time in several waves, independently of each other and without any indication of intention for one to supersede the other.[72]

The *lex specialis* principle, has been found useful in situations when terms of a specific treaty do not provide enough guidance in respect to certain issue by allowing the parties to the given treaty to 'fall back' on general international law.[73] It is questionable, however, whether the principle is useful at all when it comes to resolving norm conflicts between two law creating treaties. The principle is nowhere to be found within the VCLT and the content and nature of the principle is subject to much debate.[74] Moreover, although the principle has been used for *accommodation* of two conflicting norms there is "simply no evidence that *lex specialis* is in fact a rule of conflict *resolution* [emphasis added]."[75] Despite of this fact, it is undisputable that the term enjoys a prominent place within discussions about IHL-IHRL interplay.[76] Somewhat heretically perhaps, it is another principle this thesis will strive to critically examine.

The principle of best protection differs from *lex posterior* and *lex specialis* in that it is forward looking, i.e., teleological in nature. It is more akin to principles of legal reasoning rather than principles of law strictly speaking. In contrast to the other principles of interpretation, its basis lacks a formal structure. Instead it is based on perceived appropriateness in relation to shared purpose of IHL and IHRL.

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[72] In this respect see e.g., Kolb (1998) 409-419.

[73] ILC Draft Articles on State Responsibility (Art. 55). See also: Simma and Pulkowski (2010) 148-150.

[74] Lindroos (2005); Prud'homme (2007); McCarthy (2008).

[75] Milanovic (2010), p. 475.

[76] The authoritative 'guidelines' by the ILC make it difficult to ignore this principle, see: Koskenniemi (2006) paras. 56-122. Yet, there seems to be a move away from considering this principle as the prime solution, see: Eden and Happold (2010) 422.

1.5 Overview of the Chapters

After the chapters discussing introduction and methodology, the third chapter begins by outlining the applicability of the two regimes separately. It highlights contested issues of what constitutes armed conflict in IHL and whether IHRL can apply extraterritorially. It then proceeds to show that there is a significant support for concluding that the two regimes can apply at the same time. The fourth chapter begins by discussing the principle of best protection against trends in judicial and quasi judicial practice. After arriving at the conclusion that the support for the principle is scant, it proceeds to evaluate viability of the principle from a more policy oriented perspective. The second part of the fourth chapter is a *lex ferenda* analysis. It constitutes the core of the thesis where the principle of best protection is systematically evaluated. The overall result of the analysis is presented in the conclusion which rejects the principle of best protection as not viable in IAC but accepts that the principle is viable in non-extraterritorial NIAC. In the end it is suggested that the viability test be further refined and applied to other proposed solutions of norm conflict between IHL and IHRL for comparative purposes.

2 Methodology

The overall approach differs in the two parts of the thesis. While the first part follows basically a black letter positivist approach, the second and main part adopts a more policy oriented approach.[77] Pursuant to the fact that the principle of best protection is a contested concept, the research design adopted here provides for strict division between *lex lata* and *lex ferenda* analysis.

The first part, *lex lata* anlysis, starts by considering treaty regimes separately and then together by focusing on the issue of applicability. At points where more guidance is needed, this is drawn from judicial and quasi-judicial practice.

The second and main part, *lex ferenda* analysis, follows a strict design allowing for a systematic evaluation. Viability of the principle of best protection is evaluated against four requirements. Based on the reviewed material I have identified (i.) compliance requirement, (ii.) specificity requirement, (iii.) reasonableness requirement and (iv.) integrity requirement. Each requirement tests the viability of the principle separately for IAC and NIAC. As these four issues, albeit under different headings, were constantly brought up by different authors in different ways, it was safe to conclude that these would form a good basis for evaluation of the principle. Although this umbrella approach might be more familiar to political scientists rather than lawyers, it well suits the purpose of evaluation of the principle in the light of pragmatic concerns.

The *compliance requirement* tests whether the principle would enhance, preserve or undermine systemic mechanisms by which the law applicable in times of armed conflict aims to ensure compliance. The test thus first identifies what the most crucial mechanisms are and subsequently evaluates the impact of the principle. The importance of this requirement is simple. There is little sense in advocating for principle that would result in law that has little or no chance to be complied with.

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[77] For an overview of different approaches to International Law see: Slaughter and Ratner (1999).

The *specificity requirement* tests whether the principle would bring into play specific or rather vague norms unsuitable for times of armed conflict. The importance of this requirement rests on the assumption that clarity of norms impacts on compliance and operational effectiveness.

The *reasonableness requirement* tests whether the norms brought into play by the principle would introduce unreasonably high demands on military operations. Hence, the importance of this requirement rests on assumption that reasonability of demands that the norms require impacts, as in the previous requirement, on compliance and operational effectiveness.

Finally, the *integrity requirement* tests whether the principle would affect the IHL or the IHRL regime as a whole in a negative way. The importance of this requirement lies in potential severity of unintended consequences resulting from the principle of best protection that would outweigh the positive effects. The test thus first identifies and then assesses the potential unintended consequences.

The strength of this approach lies in the fact that it allows for focus on pragmatic assessment of the principle. Yet, as any approach, it also comes with certain drawbacks.

2.1 Limitations

The main limitation when it comes to the *lex lata* analysis is that in the end it is limited only to critical assessment of whether trends in judicial and quasi-judicial practice give persuasive support to the principle. Hence no comprehensive attempt is made to settle the issue.

When it comes to the *lex ferenda* analysis, first of all it can not be ruled out that a choice of different requirements could lead to a different result. This means that the viability test is only persuasive as far as inclusion of each of the requirements tests is justified. Second, the result of the analysis depends on the way each of the chosen requirements is tested. Further effort is therefore made to justify not only inclusion of each of the individual tests but also their designs in the respective sections. Third, due to word count limitations the analysis of IAC excludes situations of occupation while the analysis of NIAC only includes situations where a State is a party to the conflict.

Applicability of IHL and IHRL

As the principle of best protection presupposes that each of the two competing norms of IHL and IHRL are independently applicable, it is necessary to at least give a very basic outline of the issues concerning applicability of each. Hence, the purpose of this section is not to give a full and exhaustive account of the issues concerning applicability of the two regimes. Rather, the focus is on contested issues.[78]

2.2 Applicability of IHL

In terms of *ratione materiae*, there is a large body of IHL instruments applying to situations of "armed conflict" in IAC and NIAC.[79]

In terms of *ratione personae*, IHL binds States; international organizations;[80] organized armed groups; and, most importantly, individuals. In addition, there is a passive personality scope in IAC which defines differentiated protected categories of wounded, sick and shipwrecked (Arts. 13 GC I – GC II; 8(a),(b) AP I), prisoners of war (Arts. 4 GC III; 43, 44(1) AP I), and civilians (Arts. 4 GC IV; 50 AP I).

In terms of *ratione temporis*, IHL will start to apply at the moment at which an armed conflict (both IAC and NIAC) erupts as a matter of objective fact.[81] Applicability ceases, again as a matter of objective fact for IAC "on the general close of military operations" (Arts. 6(2) GC IV; 3(b) AP I) and for NIAC at the "end of the armed conflict" (Art. 2(2) AP I).

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[78] This is important as courts are often tempted to avoid norm conflicts by ruling that one or the other regime is inapplicable to the given situation because requirements for applicability of the regime in question are not met.

[79] It is unnecessary to list all the relevant IHL instruments here. For a treaty collection see: Roberts and Guelff (2000); See also the table of international instruments in: Fleck (2008).

[80] See, e.g., *UN Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law* (1999).

[81] *Tadic Jurisdiction*, ICTY (1995) para. 70.

In terms of *ratione loci*, the IHL applies mainly pursuant to principle of effectiveness on the entire territory of the State where the armed conflict is occurring whether in IAC or NIAC.[82]

The issue most relevant in respect to the remit of this thesis is the problem of classification of what constitutes an 'armed conflict' in NIAC. As classification of internal unrest as 'armed conflict' by a State would imply its political weakness for domestic and international audiences, States are generally reluctant to apply IHL to NIAC. Hence, they will often argue that the situation at hand does not correspond to the threshold implied by the term 'armed conflict'. Nevertheless, the ICTY has contributed in clarification of the term.[83] In order for the situation to qualify as a non international 'armed conflict' it has to satisfy two requirements.

First, the rebel fighters must display a minimum of organization. For example, the rebel fighters must have a responsible command, abide by military discipline and be capable of respecting the laws of war. Nevertheless, one must be wary of the fact that is often difficult to assess the organization of rebel groups when they operate as decentralised networks. What is clear, however, is that a mass of disorganized rioters would not qualify.

Second, the armed conflict must present a minimum of intensity. By specifying what an armed conflict is not, the AP II gives some guidance by ruling out situations such as "riots, isolated and sporadic acts of violence and other acts of a similar nature" (Art. 1(2) AP II). These kinds of situations would therefore fall exclusively under the IHRL regime.

2.3 Applicability of IHRL

In terms of *ratione materiae*, IHRL is concerned with the regulation of the exercise of a State's power over individuals. In so doing the regime provides for civil and political as well as economic, social and cultural rights.[84]

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[82] *Tadic Jurisdiction*, ICTY (1995) para. 68; *Akayesu*, ICTR (1998) paras. 635-636.

[83] *Tadic Jurisdiction*, ICTY (1995) para. 70; *Limaj*, ICTY (2005) paras. 88-89, 94-134; *Haradinaj*, ICTY (2008) paras. 37-60.

[84] Again, it is unnecessary to give a list of all the relevant treaties. For a treaty collection see: Brownlie and Goodwin Gill (2010).

In terms of *ratione personae*, as far as the treaty law goes it is safe to say that it IHRL is only binding upon States.[85]

In terms of *ratione temporis*, IHRL simply applies at all times. Nevertheless, subject to procedural and substantive limitations, a State is allowed to derogate from certain rights when "life of nation"[86] is threatened. The non-derogable right to life is at the heart of what makes the interaction between IHL and IHRL contentious. Namely, the fact that the right cannot be derogated from does not rule out the possibility that its content could nevertheless be influenced by IHL.[87]

In terms of *ratione loci*, a State is bound to secure rights to everyone within its territory although this can be relaxed to certain extent in respect to areas where the State has lost its ability to exercise power.[88] When it comes to extraterritorial application of human rights, there is enough evidence to support its possibility but not enough uniformity of practice to show one specific modality. The obligation of a State to apply human rights under ICCPR extraterritorially depends on the interpretation of the requirement that individuals be "within its territory and subject to its jurisdiction" (Art. 2(1)). Although *travaux préparatoires* does not support such interpretation, the practice of UNHRC was to interpret the terms territory and jurisdiction disjunctively and to maintain that, essentially, jurisdiction equals power.[89] That ICCPR can apply extraterritorially is also supported by

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[85] See footnote 36. The issue of obligations of international organizations arising from other sources than human rights treaty law will not be discussed here.

[86] Art 4(1) ICCPR; Art. 15(1) ECHR

[87] As was done in *Nuclear Weapons*, ICJ (1996) para. 25.

[88] *Ilaşcu*, ECtHR (2004) paras. 312, 330-331; ILC Draft Articles on State Responsibility (Art. 23).

[89] The UNHRC in a pioneer case held that, "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the covenant on the territory of another State, which violations it could not perpetrate on its own territory" *Burgos*, UNHRC (1981), para. 12.3; see also: UNHRC General Comment No. 31 (2004) para. 10.

the practice of the ICJ.[90] That the practice of the ECtHR supports the possibility of extraterritorial jurisdiction is beyond dispute.[91]

The modality of extraterritorial application of human rights has been controversial however.[92] As ICCPR and other regional human rights treaties differ in their wording in this regard, there is no universal international standard. Unlike under the wording of ICCPR which uses both terms 'territory' and 'jurisdiction', the wording of ECHR only refers to "everyone within their jurisdiction" (Art. 1). The latest authority on the meaning of 'jurisdiction' under ECHR is the ruling where the Court held that what is decisive is "the exercise of physical power and control over the person in question".[93] This means, in a nutshell, that a State acting extraterritorially must afford protections of ECHR to those that it detains.[94] Nevertheless, those that are not detained will fall outside of the scope of protection.

2.4 Concurrent Applicability of IHL and IHRL

That IHRL does not cease to apply simply due to presence of armed conflict is today largely a non issue. The application of IHRL during "war" is expressly contemplated by ECHR (Art. 15(1)), ACHR (Art. 27(1)) and implied by the wording of ICCPR (Art. 4(1)). That applicability of IHL does not make IHRL inapplicable is implied in AP I which requires that, in order to give effect to protection of civilians, "rules, which are additional to other applicable rules of international law, shall be observed" (Art. 51(1)). Even more expressly, it recalls that, "international instruments relating to human rights offer a basic protection to the human person" (Art. 72). Similarly the AP II in its preamble recalls that,

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[90] *Wall*, ICJ (2004) paras 111, 113; *Congo*, ICJ (2005), para. 216. Nevertheless, some States (e.g. USA, Israel) have expressed strong disagreements with this interpretations.

[91] *G v UK and Ireland*, ECiHR (1985) para. 25; *Loizidou Preliminary Objections*, ECtHR (1995) para. 62; *Bankovic*, ECtHR (2001) para. 71; *Issa*, ECtHR (2004), paras. 69-71; *Öcalan*, ECtHR (2005) para. 91; *Al-Skeini*, ECtHR (2011) para 136.

[92] A recent monograph on this issue is: Milanovic (2011).

[93] *Al-Skeini*, ECtHR (2011) para. 136.

[94] This arguably creates incentive to resort to lethal use of force in cases where detention would have been a viable alternative.

"international instruments relating to human rights offer a basic protection to the human person". That the two regimes can be applicable at the same time is further confirmed by the practice of, *inter alia*: ICJ,[95] UNSC,[96] UNGA,[97] UNHRC[98] and IACiHR.[99] A brief look through the rules and practice presented above does not allow for setting out conclusively how the two regimes are to interact. Nevertheless, it suffices to conclude that the possibility of applicability of the two regimes at the same time is a legal fact. Yet, how is the relationship to work?

[95] *Nuclear Weapons*, ICJ (1996) para. 25; *Wall*, ICJ (2004) para. 106; *Congo*, ICJ (2005) para. 216.

[96] UNSC Res. 237 (1967); UNSC Res. 1041 (1996).

[97] UNGA Res. 2252 (1967); UNGA Res. 2444 (1968); UNGA Res. 2675 (1970); UNGA Res. 58/96 (2003) paras. 3, 5; UNGA Res. 58/99 (2003) paras. 2, 5.

[98] UNHRC, General Comment No. 29 (2001) para. 3; UNHRC, General Comment No. 31 (2004) para. 11.

[99] *Coard*, IACiHR (1999) para. 39; *Abella*, IACiHR (1997) para. 158.

3 The Principle of Best Protection

As already mentioned, one proposed way to settle the IHL-IHRL relationship is to rely on the principle of best protection. Yet, is this really a generally supported solution and is it viable in any circumstances? In order to pursue answers to these questions this chapter is divided into *lex lata* and *lex ferenda* sections. While the first section does not aim to be comprehensive, the second part constitutes the main part of the thesis.

3.1 Support by Trends in Judicial and Quasi-Judicial Practice

Although treaty law does not support the proposition that the principle of best protection shall decide norm conflicts between IHL and IHRL, some provisions under IHL treaty law make explicit use of the principle in limited circumstances. For example, GC III requires that members of crews of the merchant marine and civil aircraft shall only be given prisoner of war status if they do not benefit of "*more favourable* treatment under any other provisions of international law [emphasis added]" (Art. 4(A)(5)). When it comes to provisions of fundamental guarantees of detainees under AP I, it is required that they be not "construed as limiting or infringing any other *more favourable* provision granting greater protection, under any applicable rules of international law [emphasis added]" (Art. 75(8)). These provisions, however, are very specific and applicable only to very narrow range of circumstances. One can not deduce from them a general principle of best protection guiding the relationship between all conflicting norms of IHL and IHRL. Hence, one must turn for support elsewhere.

When it comes to practice of the ICJ the Court agreed that the right not to be arbitrarily deprived of life under ICCPR also applies in hostilities and argued that the meaning of 'arbitrarily' then "falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of

hostilities".[100] However, the case was resolved in the light of *jus ad bellum* as the Court could not reach a "definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake".[101] This suggest a truly hybrid standard as in respect to use of force, any deprivation of life must be proportionate in relation to anticipated military advantage (IHL logic) as well as following a legitimate aim (IHRL logic).[102] Although relevancy of the principle of *lex specialis* is repeated in the *Wall* advisory opinion,[103] the principle was actually not applied by the court in that case. In the *Congo* case the Court refrained from even mentioning the principle and, like in the *Wall*, simply applied both IHL and IHRL. However, one can not conclude from this that the principle of best protection was applied in any of the cases as the court refrained from mentioning any norm conflict.

Similarly, the practice of UNHRC, does not give conclusive support to the principle of best protection. In its general comments the Committee recalled that, "rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers"[104] and that, "both spheres of law are complementary, not mutually exclusive"[105]. Again, there is a presumption of absence of any possible norm conflicts. Moreover, when the Committee says that IHL helps 'in addition to' IHRL, it does not necessarily mean that the norms of IHRL providing better protection should take precedence over those norms of IHL that are less protective. Equally possible is an interpretation that the Committee simply meant that both IHL and IHRL are applicable at the same time. In conclusion, one cannot draw persuasive support for the principle of best protection from the two General Comments.

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[100] *Nuclear Weapons*, ICJ (1996) para. 25.

[101] Ibid. para. 97.

[102] In contrast to this interpretation of *lex specialis*, the principle of best protection does not combine protective standards and keeps them separate.

[103] *Wall*, ICJ (2004) para. 106.

[104] UNHRC, General Comment No. 29 para. 3.

[105] UNHRC, General Comment No. 31 para. 11.

From the practice of regional treaty bodies, the most persuasive support for the principle of best protection comes from the practice of IACiHR. In the *Abella* case the Commission boldly asserted that, "where there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question"[106].

The practice of ECtHR does not give support to the principle of best protection as what the European Court does is simply applying ECHR without any express reference to IHL even when it acknowledges presence of armed insurrection. In the 2011 *Al-Jedda* case the Court did not recognize that it was facing a norm conflict between a UN Security Council Resolution (containing authorization) and ECHR (containing obligations) and thereby avoided it.[107] However, as the Court simply applies standards of IHRL to situations of armed conflict, it remains vulnerable to critique that the standards applied are inadequate. These concerns will be explored in the main part of the thesis bellow.

In conclusion, trends in judicial and quasi-judicial practice give only scant support to the principle of best protection. The most persuasive support of the principle comes from the single case of IACiHR. Yet, the question whether the principle should be supported or not remains.

3.2 *Lex Ferenda* Analysis: Viability of the Principle

To arrive at the conclusion whether the principle is feasible, it will be tested against four requirements as described in the methodology section (see chapter 2) for IAC and NIAC separately.

3.2.1 The Compliance Requirement

This section discusses whether the principle of best protection has a chance to be complied with under IAC and NIAC respectively. The first part dismisses applicability of the

[106] *Abella*, IACiHR (1997) para. 165.

[107] Al-Jedda, EctHR (2011) para. 102.

principle of best protection to IAC on the basis of lack of immediate reciprocity under the IHRL regime. The second part argues that the situation is different in NIAC where unilateral application of IHRL by a State in respect of rebels would serve to alleviate the unequal position of belligerents under IHL. It proceeds by discussing positive effects on compliance by applying higher protective standards of IHRL. It then moves to discuss the same by looking at higher protective standards of IHL and concludes by clarifying how the principle of best protection is to work in practice.

3.2.1.1 Compliance Test: IAC

If IHRL norms were applied to IAC through the principle of best protection they would not be complied with. This is because the principle would destroy the reciprocal mechanism which remains crucial in IAC.[108] First of all, while the Geneva Conventions enjoy almost universal acceptance (194 parties), this is less so with ICCPR (167 parties) not to speak of regional systems of human rights protection. Second, while the application of IHL to the opposing party is conditioned on its ratification of the Conventions, the application of IHRL is conditioned on unilateral ratification of the Covenant by the party that is to apply it. Hence, while there is an element of immediate reciprocity under IHL regime, there is no such element under the IHRL regime. It would be a futile exercise to insist that a State should apply a much higher standard of protection in respect to individuals of a hostile State while that State would not be obliged to do the same in return. As the principle of best protection leads to unequal rights and obligations, it would disintegrate the reciprocal system. As a result, the principle of best protection would lead to worse protection due to poorer compliance rate. The principle thus fails the test.

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[108] Although there are other mechanisms by which international law aims to secure compliance of States with laws applicable in times of armed conflict, (e.g., through decentralised prosecutions, where States are bound by the same norm *erga omnes*, or international criminal tribunals) it is questionable how effective these are. According to Provost decentralised sanction measures are unlikely to generate concrete results as implied by lack of significant State practice in prosecuting grave breaches, see: Provost (2002) 348. Whether recent developments in International Criminal Law and the rise of criminal tribunals culminating into creation of the ICC will bring significant results remains to be seen. The analysis here therefore excludes these aspects.

3.2.1.2 Compliance Test: NIAC

In NIAC, the argument that application of IHRL would undermine reciprocity and hence lead to non-compliance with humanitarian standards is not equally persuasive. The way the rebels are induced to comply with humanitarian norms of AP II lies in conditioning the application of the rules by a State on the capacity of rebels to implement them (Art. 1). Practice shows, however, that this is not enough to result in rebels' compliance.[109] This results from lack of systemic reciprocity, *inter alia*, due to the fact that rebels are not shielded from the effects of domestic law in contrast to government soldiers. While in IAC the AP I gives the combatants "the right to participate directly in hostilities" (Art. 43(2)), there is no such right in NIAC under the CA 3 or AP II. Nevertheless, it is easy to argue that State forces will retain such right through customary law while rebels will not.[110] Similarly, while IHL provides for a regime of prisoners of war in IAC (GC III), there is no such regime under NIAC where rebels may simply be detained as criminals. The crucial caveat is that, in contrast to criminals detained under the IHRL regime, the rebels captured under IHL are not guaranteed the right to *habeas corpus*, access to a lawyer, or to inform their close relatives of their whereabouts. The lack of systemic reciprocity thus ends up creating imbalance and potential for resentment on the part of rebels. Unilateral observance of IHRL on the part of a State (in cases where this provides a higher standard of protection) would, arguably, serve to alleviate this imbalance.

Theories of compliance based on reciprocity models are less appropriate for situations where polarization of identities of belligerents is not as static as in international armed conflicts. Modern counterinsurgency theory shows that human rights excesses by States such as collateral damage allowed under IHL or detention without judicial review (not prohibited under IHL) only alienates population and perpetuates conflict.[111] If this argument holds it follows that it is in the interest of States to apply as high standard as

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[109] Provost (2000) 161-162.

[110] This follows mainly from the structural bias inherent in international law where customary law reflects State practice and opinio juris of States.

[111] To certain degree this has been reflected in, e.g., US Military Counterinsurgency Manual (2006) para. 1-132; US Government Counterinsurgency Guide (2009) 22.

possible in NIAC. Unless a State engaged in fight with rebels is able to come up with effective means to discredit discourses in which it figures as careless oppressor, it will never be able to diminish domestic support of rebels and certainly not support coming from abroad (e.g., from diasporas). Collateral damage and detention incommunicado will continue in providing just enough fuel to rebels in terms of material and financial support sources. The principle of best protection would thus introduce standards that make more strategic sense and is therefore viable.[112]

In respect to compliance by rebels, the argument to be made here is that applying the highest standard by a State is not only good in terms of ending the conflict but also in terms of rendering pressure within the local population on insurgents to comply with humanitarian standards or else risk loosing popular support. Hence, unilateral application of higher standard by State would actually increase compliance of rebels with IHL and potentially also with some additional norms of IHRL (though certainly not all as many such obligations are incapable of implementation by non-State actors).[113] When it comes to compliance by rebels, therefore, the principle of best protection is viable as well. Nevertheless, the resort to the principle requires that both regimes are applicable.

As a matter of law, the applicability of IHRL is not a contested issue under domestic settings and the challenge here rather seems to be to persuade States to expressly apply IHL in times of armed conflict as well.[114] An argument in this regard is that application of IHL provides an inducement for rebels to comply with humanitarian norms. Another argument is that this brings about accountability of rebels for violations of the laws and customs of war that is likely to be more elaborate than what a domestic legal system would provide on its own. Furthermore, it also allows States to be more flexible

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[112] Even if one disagreed with the assumption that States are rational actors, this would not impinge on the argument of viability. The argument that there is a strategic sense in resort to higher standards does not serve to advance the position that it is 'likely' that States will do so but only that it is *viable* for them to do so.

[113] It is especially unrealistic to expect rebel groups to guarantee the right to *habeas corpus* to detainees as this would require them to have an effective judicial system.

[114] In domestic setting States tend to consider the threshold for what constitutes 'armed conflict' as set very high, see: Gross and Aoláin (2006) 360.

once it comes to peace negotiations as explained bellow. At the same time, if the principle of best protection is adhered to, such application will not impinge on protections afforded by IHRL but rather strengthen them.

Consider for example a scenario of a country that just finally reached an end of a civil war where a large number of the population, say 20%, constituted, or collaborated with, rebel forces. Should a State prosecute possibly thousands of individuals for murders under domestic law for killings of soldiers even in cases where such killing was not in violation of IHL? Similarly, should a State prosecute tens of thousands other collaborators for treason? As described in more detail bellow, while IHL leaves States with a discretionary power to give amnesty, IHRL does not necessarily open up for such discretion.

Under IHRL, one issue is whether there is a duty on the part of the State to prosecute violations. ICCPR requires States to "ensure" the rights set forth in the covenant (Art. 2(1)). In respect to the right to life (Art. 6) this means that State is required not only to abstain from actions that undermine this right but that it also must take "appropriate measures" to protect against non-state actors that do so.[115] Furthermore, in case of violation there must be a possibility for effective remedy (Art 2(3)). Consulting the provisions does not give a clear answer then. On the one hand the rules strongly encourage prosecution while, on the other hand, the rules do not contain an express obligation to prosecute. The issue was dealt with in the case *HCMA v. The Netherlands* where the Human Rights Committee observed that, "the Covenant does not provide for the right to see another person criminally prosecuted"[116]. The fact that there is no explicit obligation to prosecute under IHRL,[117] however, does not automatically mean that the regime allows for amnesties. Granting of amnesties is seen as a failure of the duty to ensure human rights and as a practice encouraging further violations. IHRL does not prevent the State (or families of the fallen soldiers) to seek redress under the domestic law, quite to the contrary, it enables and facilitates it. Such prosecutions could go way beyond prosecuting for killings. If other

[115] UNHRC, General Comment No. 31 (2004) para. 8.

[116] *H.C. M. A.*, HRC (1989) para. 11.6.

[117] *Ireland v. UK*, ECtHR (1978) para. 10; *Velasquéz-Rodríguez*, IACtHR (1988) para. 166.

actions of rebels are classified as treason under the domestic law, this would result in tens of thousands of people in some way associated with the former rebels in facing harshest of sentences and, in case the country has not abolished it, even death penalty. While there is no general prohibition against amnesties under IHRL, the regime neither provides for such discretion.[118] From a policy perspective it is hardly feasible to argue in favour of them under the rubric of IHRL where they are conceived of in different contexts. For example, in the context of elaborating on the prohibition of torture, the Human Rights Committee stressed that, "amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future"[119]. Torture, however, just like many other breaches of the laws and customs of war, would also be considered as crime under IHL (for which amnesties should not be given as argued bellow). In spite of this fact, the IHRL regime simply frames all rebels and collaborators as criminals that need to be prosecuted and punished.

IHL gives more flexibility to States when it comes to granting of amnesties. AP II expressly provides that the State "shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict" (Art. 6(5)). Although the word 'endeavour' allows for some leeway, the provision gives a very strong legal argument in favour. It does not mean that a State should (or could) give amnesties for acts that fall under the rubric of international criminal law.[120] In respect to the draft of the article the USSR, for example, stated that that the text "could not be construed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever"[121] and the same position has also been

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[118] In cases were States decide to proceed with granting amnesties, this must then be guided by the principle of non-discrimination.

[119] General Comment No. 20, HRC, (1992) para. 15.

[120] That war crimes can arise under NIAC has become generally accepted since the initially controversial Tadic ruling, see: *Tadic Jurisdiction*, ICTY (1995) para. 97.

[121] Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1976) 319 para. 85.

maintained by the ICRC.[122] To be able to make a use of this provision, however, requires from the State not to apply IHRL exclusively but to admit application of IHL.

The example elaborated above is also useful for the purpose of clarifying possible misunderstandings when it comes to application of the principle of best protection. First, the principle presupposes a norm conflict. As the IHRL does not contain a prohibition against amnesties, there is no norm conflict in the strict sense. Although there is a conflict in the wide sense, it is not a genuine conflict because it allows for accommodation via interpretative means. Second, the principle presupposes that, from the perspective of a victim, two norms that that are in conflict are applicable. Here, however, we are faced with the situation where there are two conflicting perspectives of victims with rebels and collaborators on the one side and the fallen soldiers and their families on the other. Hence, the application of the principle of best protection is neither necessary nor possible in this case. Another example bellow will illustrate a case when the principle of best protection can be applied successfully. The following example also serves to advance the argument that applicability of IHL in times of armed conflict is in the interest of States as it enhances accountability of rebels.

The standard of protection against torture is higher under IHL than under IHRL.[123] This is due to the fact that under IHL the definition of torture has less stringent requirements. As a result, accountability for torture is better achieved by resorting to the respective norm of IHL through the principle of best protection.

Unlike under IHRL, IHL does not contain a public official requirement. While ICCPR simply prohibits torture (Art. 7), CAT, a more specific human rights treaty in this regard, elaborates that the protection applies only against torture that is perpetrated "at the instigation of or with the consent or acquiescence of a public official or other person in an official capacity" (Art. 1). Under IHL in contrast, CA 3 and AP II provide for the

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[122] ICRC (1995).

[123] The following analysis comparing standards of protection against torture under IHL and IHRL is based mainly on: Larsen (2010) 268-269. The analysis included here excludes consideration of regional human rights standards. For analysis of the scope of the prohibition against torture under ECHR see: Larsen (2010) 434-438. For other examples where the IHL provides higher protection see: Orakhelashvili (2008).

prohibition of torture without any further requirement.[124] The public official requirement is also missing in the ICC Elements of Crimes when it comes to both torture as a war crime (Art. 8(2)(c)(i)) and torture as a crime against humanity (Art. 7(1)(f)). The ICTY considered elements that constitute torture under customary law in *Kunarac* and held that, "the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual".[125] Hence, under IHL anybody committing torture, whether somehow linked to official capacity or not, will be accountable before the law. Under IHRL, however, accountable will be only those linked to official capacity although a State will remain accountable in cases where it can be shown that the State failed to ensure respect for the prohibition.

At least in the context of crimes against humanity, IHL unlike IHRL does not contain a specific purpose requirement. While CAT requires torture to be perpetrated "for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind" (Art. 1), there is no such requirement under IHL. As was already mentioned, the CA 3 and AP II contain no further requirements. In respect to the crime against humanity of torture (Art. 7(1)(f)), the ICC Elements of Crimes expressly states that, "no specific purpose needs to be proved for this crime."[126] If the meaning of torture under IHL is interpreted in the light of ICL, the requirement of purpose will not be present in cases were torture constitutes a crime against humanity. Whether the case of torture constitutes a crime against humanity or not, IHRL only provides for protection against torture where it is perpetrated with a specific purpose. IHL, on the other hand, provides for protection against torture, at least where it constitutes a crime against humanity, even where it is perpetrated without any purpose. In conclusion, IHL provides for accountability for torture where IHRL does not in respect of the specific purpose requirement as well.

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[124] Art. 3(1)(a) GC I – GC IV; Art. 4(2)(a) AP II.

[125] Kunarac, ICTY (2002) para. 147.

[126] This is expressly provided in the footnote number 14 to the ICC Elements of Crimes.

As the requirements of official capacity and specific purpose restrict protection against torture under IHRL, the principle of best protection will decide in favour of IHL which, in this case, provides for a higher protective standard. There is no norm conflict in the narrow sense. As was mentioned in the introduction (*supra* 1.2.), narrow definition of norm conflict requires a situation where two obligations could not be simultaneously abided by without one breaching another. In this case, however, application of the IHL norm would not breach the obligation of the competing IHRL norm. There is, however, a norm conflict in the wider sense as the application of the two norms leads to two different legal results. Due to the fact that under IHRL the requirements are expressly required whereas under IHL the same conditions are expressly excluded, this norm conflict can not be accommodated through interpretation and is therefore genuine. The norm in question – prohibition against torture – aims at protection of the same addressees, in this case all individuals. Hence, there is no problem in applying the principle of best protection.

This section argued that compliance with applicable law pursuant to the principle of best protection is a viable option for States and that this is also likely to enhance compliance by rebels. Nevertheless, the principle is predicated upon applicability of both IHRL and IHL. Since States are reluctant to expressly apply IHL, two examples were advanced to illustrate both why this is a good policy and, simultaneously, to clarify how the principle of best protection works in practice. In the last example, prohibition against torture in IHL trumped IHRL. When it comes to issues of deprivation of life and detention it will be mostly IHRL norms trumping IHL. Yet, how are soldiers to comply with norms when their content in situations of armed conflict is contested even by lawyers?

3.2.2 The Specificity Requirement

First of all, in order for commanders and soldiers to do their work both effectively and in accordance with law, they need very clear and specific rules. Situations where matters of life and death often depend on split-second decisions do not allow for complicated on-the ground assessments. The rules need not only to be understood and trained, it is also necessary that they allow for easy application once the soldiers are deployed in the field.

As some have argued, there is a greater likelihood of compliance with IHL that developed in light of military considerations than with vague human rights.[127]

Secondly, non-compliance with norms addressing deprivation of life goes hand in hand with individual criminal responsibility. It is this overlap with criminal law – where the principle *nullum crimen sine lege certa* (prohibition of unclear terms in criminal statutes) provides protection from the law itself – which necessitates clarity.

This section argues that under IHL the rules provide much better guidance than IHRL when it comes to issues of targeting, and detention in IAC but cautions that the situation is different in NIAC. The two issues are crucial in that they pertain to the area of combat operations where the room to engage in legal deliberations is restricted. Not all issues that are regulated by IHL, however, are of such a nature. A typical example is that of repatriation of prisoners of war after cessation of hostilities. This provides a room for arguing that IHRL can play a limited role in such cases although, in the final analysis, it does not give persuasive reasons to use the principle of best protection in IAC. The situation is dramatically different in NIAC, however, where even the basic IHL rules pertaining to targeting and detention remain ambiguous. As a result, the requirement of specificity does not run against the employment of the principle of best protection in NIAC situations.

3.2.2.1 Specificity Test: IAC

In respect to conduct of hostilities in IAC, the rules of IHL offer a much higher level of legal determinacy than IHRL. As human rights provisions tend to be vague, one needs to rely heavily on jurisprudence of courts. There is a caveat, however, that in most cases the standards developed by courts will remain context dependent. Hence the rule that, "no one shall be arbitrarily deprived of his life" (Art. 6(1) ICCPR) or the rule allowing use of force that is "no more than absolutely necessary" (Art. 2(2) ECHR) will attain different meanings in different situations. One can not expect that a court will judge in the same way issues arising in times of armed conflict as in times of peace. As a result, IHRL norms not only lack in specificity (they are vague), they also lack in determinacy (their content changes

[127] Feinstein (2005) 301.

according to context). The norms of IHL, in contrast, are much more specific, especially when it comes to issues such as targeting (that is regulated by a whole set of numerous interlocking norms) or detention of combatants (to which a whole regime of extremely detailed norms is devoted). Moreover, they are made with one context in mind – that of armed conflict. Nevertheless, there are also issues in respect to which IHL norms are either less elaborate than respective norms under IHRL, or in respect to which both IHL and IHRL are equally specific.

In cases where IHL norms are less elaborate than respective norms under IHRL, e.g., section regulating fair trial (Arts. 72-79 AP I), these differences can be accommodated by interpreting the former in the light of the latter. For example, under IHL those facing prosecution shall be subject to a court "respecting the generally recognized principles of regular judicial procedure" (Art. 74(4) AP I). The provision goes on the say that such principles "include" those listed bellow (Art. 74(4)(a-j)), hence implying that the list is not exhaustive. That a reference may be made to IHRL is expressly provided for in the beginning of the same section that refers to "other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict" (Art. 72 AP I). In this respect the rules under IHRL dealing with the issue provide more specific guidance (Arts. 14-16 ICCPR). In cases where there is no norm conflict even in the broad sense, the principle of best protection is irrelevant and it is rather the principle of *lex specialis* that is more suitable in guiding the interpretative process.

Yet, one can not ignore issues in respect to which both IHL and IHRL have very specific norms that clash. In cases where prisoners of war are likely to be tortured as traitors upon repatriation, a conflict of norms in the narrow sense will arise. While under IHL "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities" (Art. 118 GC III), under IHRL "no State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" (Art. 3(1) CAT).[128] This

[128] The principle of *non-refoulement* comes from the refugee law (Art. 33 CRSR). At least under the European system, it is also implied from the prohibition of torture (Art. 3 ECHR) see: *Soering*, ECtHR (1989); *Chahal*, ECtHR (1996); *Hilal*, ECtHR (2001).

is due to the fact that neither of the two provisions creates rights but rather both impose obligations where if one is abided by the other becomes breached. As there is a norm conflict, the principle of best protection becomes relevant. Proceeding with the analysis from the perspective of a specific victim to be repatriated that faces the risk of being tortured, the principle of best protection points to the norm of *non-refoulement* as providing the highest standard of protection. If, however, one accepts the argument that the principle of *non-refoulement* belongs to *jus cogens*,[129] the resort to the principle of best protection is not necessary. The obligation to repatriate simply can not be interpreted as being in breach with *jus cogens* as this would mean the GC III is void as a whole.[130]

In conclusion, the argument that IHL norms are much more specific and clear when it comes to issues pertaining to conduct of hostilities in IAC is warranted as far as issues of targeting and detention are concerned (i.e the activities most specific to armed conflict). Moreover, where this is not the case, the resort to the principle of best protection is not necessary. This is mostly because norm conflicts that arise can easily be accommodated through interpretative process. In one case, however, the norm conflict was identified as genuine. This concerned repatriation after cessation of hostilities versus the principle of *non-refoulement*. Nevertheless, even here the resort to the principle of best protection is unnecessary as invocation of the notion of *jus cogens* achieves the same result. The principle therefore fails the test. That the principle of best protection is of more use situation is different in NIAC is argued bellow.

3.2.2.2 Specificity Test: NIAC

When it comes to NIAC, the argument that the rules of warfare need to be clear so as to be operative in the heat of battle hardly supports the position that IHL should enjoy higher status vis-à-vis IHRL. This can be illustrated on IHL rules concerning targeting and detention.

The IHL rules applicable in NIAC do not provide clear rules when it comes to targeting. CA 3 provides protection against attacks to those who are "taking no active part

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[129] Allain (2001).

[130] Art. 53 VCLT

in hostilities" while the AP II protects civilians "unless and for such time as they take a direct part in hostilities" (art. 13(3)). Hence the question of life and death hinges on the meaning of 'direct (or active) participation in hostilities.' In this respect the ICRC has come up with three cumulative criteria that must be satisfied – threshold of harm, direct causation and belligerent nexus.[131] It is unnecessary to go into the details of these requirements here.[132] For the purposes of this section it is enough to briefly illustrate the problematic issues.

One issue is whether a rebel who stops fighting and goes home (with the intention to return to fight the next day) can be lawfully targeted in her home while she is not fighting. Another issue is whether persons that engage in war-sustaining efforts without actually fighting (e.g., recruiters, trainers, financiers, propagandists, weapon smugglers) can be lawfully targeted or not. In respect to the second issue, the ICRC has taken the position that such persons can not be targeted even though they are members of the armed group.[133] The argument is that under IHL (in IAC) one must always distinguish between those belonging to armed forces and those that do not. By transposing this principle to the level of NIAC, the ICRC insists that only those members of the armed groups displaying "continuous combat function" can be targeted on a continuous basis. This also gives an answer to the first issue, namely that as long as the rebel remains a member of the armed group where she retains the combat function, she can lawfully be targeted. This solution is not without problems.

Unfortunately, in situations of insurgency, where fighters come and go (that is cease to be members only to become members again later) or shift functions (e.g., from fighters to financiers to commanders), targeting fulfilling this requirement becomes operationally very demanding endeavour. In addition, clear rules of targeting under IHL could offer potential for abuse in NIAC. This is because clear rules would provide dubious regimes with 'recipes' on how to lawfully eliminate enemies once the threshold for armed conflict was reached (something that the regime could easily influence itself). Hence, clear rules on

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[131] Melzer (2009) 46-64.

[132] For a concise summary see: Schmitt (2010) 250 para. 11.

[133] Ibid. 37-38; See also: Melzer (2008) 275-276.

targeting in IHL would in practice undermine important guarantees under IHRL. As a result of these concerns, the guidelines have not been widely endorsed and the issue is likely to remain contentious. It is fair to conclude, therefore, that there is a considerable amount of legal uncertainty in addition to the separate problem of lack of simplicity (an issue that is dealt with in the next section).

The issue of detention is also problematic under IHL when it comes to NIAC. The CA 3 and AP II presuppose that States will detain individuals during the armed conflict. The former mandates affording "judicial guarantees recognized as indispensable by civilized peoples" (Art. 3(1)(d)) while the latter affords a whole list of basic protections to those whose liberty has been restricted (Arts. 4(1); 5). Neither the CA 3 nor the AP II, however, gives a State the right to detain. In any case, even if one accepted that such right could be deduced from the mentioned provisions, the question whom and under what conditions would still remain unclear.

A meeting of experts sponsored by the ICRC and Chatham house came with a conclusion that existence of this right is "consistent with the spirit of IHL"[134] in so far as it fulfils the requirement that it is necessary for imperative reasons of security. Of course, that a conclusion was reached as a result of an expert meeting does not make it a statement of *lex lata*. On the one hand, this interpretation is not consistent with the general rule of interpretation enshrined in the article 31 VCLT. The article requires that one shall proceed from the "terms of the treaty" and it is these terms that are to be interpreted in "their context and in the light of its object and purpose." One can not supplant lack of terms with a spirit. Neither can one prove that the right to detain exists as a matter of customary law, without showing evidence of State practice accompanied by *opinio juris*.[135] The ICRC customary study only shows that arbitrary detention during armed conflicts is prohibited (rule 99) but does not conclusively prove the existence of the right to detain. The study clarifies grounds for internment and procedural requirements of internment under IHL by

[134] See: Debuf (2009) 863.

[135] This requirement goes back at least to the *North Sea Continental Shelf Cases*, ICJ (1969).

consulting IHRL.[136] Hence, this methodology is insufficient to prove that there is such a customary rule solely under IHL, i.e., independent from IHRL and its requirements.

On the other hand, however, there is a strong policy argument that in the absence of possibility to lawfully detain, IHL would create a perverse incentive for the rebels to kill rather than capture. At least in respect to rebels, the right to detain then *should* exist. It is questionable, however, whether such right *without any further restrictions*[137] should be conceded to States. For the same policy reasons as with rebels, the right under IHL can not be denied entirely under IHL even for States. Yet, it can not be unqualified either. However, the already mentioned meeting of experts concluded that the alleged *qualified* right to detain "would probably not be acceptable under IHRL due to the lack of specificity."[138] Just like with targeting then, the issue of detention suffers from the fact that the standard is unclear under IHL. It is unnecessary to compare this standard with that of IHRL which is clearly more specific. The implication for the principle of best protection is that the principle would not bring into play a rule which is less clear, but rather the opposite. The same is true if one compares the IHL standard of targeting vis-à-vis the standard of use of force under IHRL as done bellow.

When it comes to the issue of use of force, at the very least it is clear that under IHRL the force employed must be strictly proportionate to the achievement of the permitted aims. Nevertheless, the arguments that the standard was developed for law enforcement operations or that it has never been tested by courts in respect to killings of rebel fighters[139] should be taken into account.[140] However, under ECHR, at least,[141] there

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[136] Henckaerts and Beck (2009) 347-352.

[137] Neither CA 3 nor AP II provides for any requirement of any reviewing whatsoever of the grounds of detention.

[138] Ibid. 864.

[139] Sassoli and Olson (2008) 612.

[140] To this one can add the problem that the standard under ICCPR is elaborated mostly in soft-law instruments and that under ECHR the court is not legally obliged to follow the doctrine of stare decisis.

[141] Upon reviewing treaty based jurisprudence of ECHR, ICCPR, ACHR and ACHPR, Melzer convincingly shows that in respect of the standard regulating deprivation of life there is no significant discrepancy between them: Melzer (2008) 91-120.

is very little room to stretch this standard too far even in respect of rebel fighters. The Convention requires that "for the purpose of quelling a riot or insurrection" (Art. 2(2)(c)) the use of force must be "no more than absolutely necessary" (Art. 2(2)). Hence, in the absence of derogation (Art. 15(2)) the court must always ask itself the legitimacy question of whether there is another way of achieving the aim that would not involve deprivation of life of the specific individual – whether she is a rebel or not. As a result, a rebel fighter engaged in insurrection can never be killed simply qua being a rebel fighter. She can only be killed if that is strictly proportionate to the aim of quelling the insurrection. The principle of distinction does not exist under IHRL. True, the Court has, on occasion,[142] made an assumption to the negative (i.e. it assumed there was no other way but to engage in bombardment) simply by referring to the context of insurrection. Nevertheless, one should not underestimate the fact that it has never failed to ask itself the legitimacy question or to consider the relevant evidence prior to making the assumption.[143] Moreover, the court has never conditioned the legitimacy test on analysis of whether those hit were civilians or fighters which leads to the conclusion that the legitimacy test is not restricted to non-fighters. To conclude, the standard under IHRL in respect to killing is more specific, albeit dependent on context, than the corresponding one under IHL. The principle therefore passes the test.

The downside is that the IHRL standard is context dependent and implies operational difficulties. This brings up another question. Can soldiers engaged in difficult battlefield conditions be reasonably expected to abide by highly sophisticated norms?

3.2.3 The Reasonableness Requirement

Even where the standards restricting warfare are clear, they can still be excessively high in relation to what is possible to achieve under given circumstances and render thereby military operations ineffective. This would have further consequences leading to non-compliance with such unrealistically high standards. Hence the aim of this section is to assess whether the principle of best protection would introduce unreasonable demands. Yet,

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[142] Isayeva et al., ECtHR (2005) para. 181.

[143] Ibid. paras. 179-180.

how far military effectiveness should go, i.e., what is 'unreasonable' is at heart a normative and discursive question.

When it comes to wars on the international level, States have negotiated a series of IHL treaties that seek to preserve military effectiveness as much as possible. As the issue here is that of a State waging war against another State, the need for military effectiveness is generally understandable from the perspective of citizens of any of the two States.

When it comes to wars on the domestic level, however, the image is that of a State fighting a war against its own population. Hence, from the perspective of citizens, the normative assessment of how much should be sacrificed in the name of military effectiveness is altered. As evidenced by IHRL treaties, very high standards of protection, whether ensured by complex norms or not, take precedence against considerations of military effectiveness. It is only when the gravity of situation meets stringent criteria that the protective standard can be lowered so as to allow for a higher level of effectiveness in combating the given threat.

3.2.3.1 Reasonableness Test: IAC

Should States, while engaged in war against each other, prefer higher but complex protective standards of IHRL for their commanders and soldiers rather than simple but effective rules of IHL? From the human rights perspective, the principle of discrimination – one of the most basic principles of IHL – is unsettling as it provides that, "people may be attacked and killed simply because of the uniform they wear."[144]

What a normative analysis can not ignore, however, is that, whether for better or worse, States are still the primary actors in international relations. In the framework where States are answerable primarily to their own constituent citizenry, the effectiveness with which any State can fight off *alien* threats will remain of the utmost importance. This impacts the consideration of 'reasonableness' as mentioned earlier. It is this normative scaffolding (or public discourse) on which the need for simple rules rests and it is within these confines where both the considerations of humanity and the considerations of military necessity serve as normative boundaries. Unless the prevailing discourse undergoes

[144] Koller (2005) 232.

significant changes, advocacy for more complex and stringent norms in warfare will remain vulnerable to charges of naivety and utopia as it is simple to dismiss them as 'unreasonable'. The principle of best protection therefore fails the test here. When it comes to fighting wars inside States, however, the underlying normative logic is different.

3.2.3.2 Reasonableness Test: NIAC

Prima facie, the argument that norms guiding the conduct of warfare need to be simple so as to allow for effective military conduct has enjoyed considerable support even in respect of NIAC. When the AP II was being negotiated, for example, all elements that were seen as too sophisticated to be easily applied were removed.[145] It would thus seem that the issue of simplicity and military efficiency on the one hand versus complexity but higher protective legal standard on the other was settled in favour of the former. If this were the case, the principle of best protection would fail the reasonableness test here as well. Such a view, however, has to be rejected. The AP II is only one instrument out of many that are relevant in civil wars scenarios and hence can not be conclusive as to the normative consensus on the issue. Moreover, the normative logic brings into play further considerations.

Under IHRL, high standard of protection is more important than high effectiveness of State apparatus to deal with threats it faces. What calls for sophisticated rules of checks and balances is precisely the effectiveness of the bureaucratic machinery and its possible abusive consequences in respect to its own citizenry. The logic of human rights regime does not loose relevancy upon an outbreak of civil war. In fact, the regime takes the possibility of civil wars into account and seeks to keep the conduct of warfare within its own confines by providing for the regime of derogations.

It is for this reason that special police forces must conduct their operations under very stringent rules of IHRL even during extremely complicated counter-terrorist operations. Rules allowing the State forces to shoot 'terrorists' on sight simply per the label would put many civilians in danger. Given that objectives do not differ, there is no reason why special military forces could not be trained to abide by the same rules. Nevertheless, some have raised the issue that military training needs to be the same for NIAC and IAC so

[145] Junod (1983) 33.

as to allow for deployment of the same forces in different situations.[146] This argument, however, is not convincing in an era where armies are differentiated into specialized units that have their own training programmes and different standard operating procedures.

More importantly, at least in domestic context, States can simply make use of derogations once the conflict reaches a high enough level of intensity which "threatens the life of the nation". The norms most pertinent in situations of armed conflicts guiding detention[147] and deprivation of life[148] can be derogated from. As breaches of the rest of the non-derogable rights would constitute breaches of IHL anyway, their impact on military effectiveness is irrelevant. Other IHRL norms enshrined in treaties that do not provide for derogation can still be limited as far as is required to secure "public order" (Art. 29(2) UDHR). Hence, it is difficult to see how the use of the principle of best protection would render military operations ineffective.

The possibility of using derogations in respect to extraterritorial combat operations is a contested issue. Both ECHR and ICCPR only allow for derogations where "the life of the nation" is threatened (Art. 4 ICCPR; Art. 15(1) ECHR). The meaning of 'the nation' is traditionally understood to refer to the State making the derogation. One possibility would be to make use of the provision in respect to extraterritorial operations as well. This could be done by interpreting the term 'nation' as referring to the State where the military operation is taking place.[149] In the context of individual military operations by States this has problematic implications. It would allow a State to derogate from its own human rights obligations when intervening into another State exactly in pursuance of the aim to bring down the other State's political regime and to do this by otherwise illegal means.

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[146] This argument is mentioned in Sassoli and Olson (2008) 609.

[147] The prohibition against arbitrary detention (e.g., Art. 9 ICCPR, Art. 5 ECHR) are not listed as non derogable norms (see: Art. 4(2) ICCPR and Art. 15(2) ECHR).

[148] ECHR allows derogation from the right to life "in respect of deaths resulting from lawful acts of war" (Art. 15(2)). ICCPR does not allow for derogation from the right to life as ECHR but the term 'arbitrary' allows for relaxation in the same way in the time of armed conflict following the decision in the *Nuclear Weapons*, ICJ (1996) para. 25. This would not, strictly speaking, be derogation, however, and would thus not create the obligation for stringent control that the derogation regime provides for, see Arts 4(1) and 4(3).

[149] In the context of UN-mandated peace operations this was suggested by Larsen (2010) 449.

There are other possible avenues to address the issue of effectiveness in extraterritorial operations. As remarked by Lord Justice Sedley when referring to the doctrine of effective control developed by the ECtHR, "no doubt it is absurd to expect occupying forces in the near-chaos of Iraq to enforce the right to marry vouchsafed by Art. 12 or the equality guarantees vouchsafed by Art. 14. But I do not think effective control involves this. […] What it does is place an obligation on the occupier to do all it can."[150] Although the expression 'all it can' is indeed vague, it points to possibility of developing a more flexible gradualist approach. Whether this approach becomes something more than just a personal opinion of one judge, however, remains to be seen.

Another argument against applying the principle of best protection also relevant to NIAC is that application of one regime (as opposed to some combination of the two) offers "the clear advantage of being operational in difficult conflict environments."[151] However, the principle of best protection does not require complex interpretative deliberations as would be required under the complementarity theory. Indeed, it would be valid to object that to be able to constantly assess which paradigm, whether that of law enforcement or that of hostilities, does any given situation fall into is unrealistic on the battlefield.[152] That would demand from soldiers and commanders to be able to constantly shift attitude and mindset from one situation to another.[153] This is not the case here. As long as both regimes are applicable, it simply requires application of the highest protective standard irrespective of the immediate context. Nevertheless, this position has been criticized as it can be difficult to determine what the better standard actually is.[154] However, as long as one takes purely legalistic approach, disregards contextual complexity, and puts focus on the interests

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[150] Al-Skeini I, Court of Appeal (2005), para. 196.

[151] Larsen (2010) 273.

[152] It is difficult to see how this conceptual distinction satisfies the requirement of normative simplicity. Consider, for example, following scenario "the response by US forces to an RPG attack upon one of their convoys in the midst of Baghdad may, for instance, be considered to be covered by the law on the conduct of hostilities, while the firing upon a car failing to stop at a checkpoint is covered by human rights law applicable to police operations" Sassoli (2005) 665; See also: Melzer (2010) 33-49.

[153] McLaughlin (2010) 230.

[154] Schabas (2007) 593.

of concrete individuals, the decision as to which of the two conflicting standards offers a higher standard of protection is pretty straightforward. Moreover, for cases where both IHL and IHRL are applicable, it is not at all impossible to conceive of clear guidelines identifying the highest standards of protection.[155]

3.2.4 The Integrity Requirement

The proceeding sections will deal with the so called 'law of unintended consequences.' The term does not refer to law in legal sense but rather serves as an idiomatic warning that an intervention in a complex system tends to lead to outcomes that are both unexpected and undesirable. The focus here will be on the regimes as such with the aim to assess possible negative implications on both the IHL and the IHRL regimes arising from the principle of best protection.

3.2.4.1 Integrity Test: IAC

From the perspective of IHRL, there is a concern of undermining its purported *jus contra bellum*[156] and legitimizing war.[157] The principle of best protection would bring in IHRL to the context of deprivation of life in wars. Yet, if international wars were fought under IHRL, how could one at the same time say that there is a human right to peace? Strictly speaking, the result would point to the return of the just war doctrine where war is waged in

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[155] The guidelines would be similar to, but conceptually different from, guidelines identifying minimum standards of protection relevant to situations when neither IHL nor IHRL are applicable (see: Turku Declaration, op cit). The conceptual difference arises from the fact that in the case of minimum standards it was important to find overlap within the common 'inner core' whereas in the maximum standards one would need to identify 'outer maximum' where the overlap is lacking. A somewhat similar suggestion was made by Sassoli and Olsen (2008) 616.

[156] Although the notion of jus contra bellum remains underdeveloped, several sources are cited in support. The UDHR provides that, "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (Art. 26); ICCPR requires that, "propaganda for war shall be prohibited by law" (Art. 20(1)); the ACHPR sets out the right to "international peace and security" (Art. 23); and one should also not forget the references to "freedom from fear" of the preambles of UDHR, ICCPR and ICESCR. See: Schabas (2007).

[157] Verdirame (2008) 691.

order to bring peace and where, to the extent possible given the conditions of war, innocents among enemies are given protection. This is indeed hardly a desirable result and therefore the principle fails the test.

3.2.4.2 Integrity Test: NIAC

In NIAC we are confronted with a dilemma. On the one hand, choosing to decide in favour of IHRL in NIAC (where no derogation has been made) through the principle of best protection could lead to watering down of IHRL standards. On the other hand, choosing not to decide in favour of IHRL could lead to misuse of military effectiveness under IHL by a State against its own citizens. Application of IHRL through the principle of best protection in NIAC would create an incentive for courts to make the IHRL standards effective in combat situations. There is a fear this would lead to watering down of the IHRL standards through a series of consecutive precedents as "allowing the State to kill combatants or insurgents under human rights law without showing the absolute necessity for doing so, or to detain preventively during armed conflict, might lead to allowing the State to do the same outside armed conflict."[158] Yet, how persuasive is this argument if we take into account the normative importance of the derogation clause?

As already explained (in *supra*. 3.2.3.), the discursive logic under NIAC differs from that of IAC. It is not unreasonable to expect international human rights courts to do exactly what they are supposed to do – to protect citizenry against the unequally strong bureaucratic machinery of their States. Indeed, the stubborn reluctance of the ECtHR to expressly refer to IHL (which, by itself, would not imply application) can be explained by the fear of 'letting the devil into its backyard', that is, giving undue weight to military effectiveness.

This brings us back to the importance of the derogation clause. If no derogation is made, the Court simply must judge the situation "against normal legal background"[159] as the ECtHR did in the Isayeva case. From the perspective of Nils Melzer this reference seemed as "unfortunate", "needless" and "unhelpful" because the court "did anything but

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[158] Milanovic (2010) 462.

[159] Isayeva, ECtHR (2005) para. 391

apply a 'normal legal background'"[160] Indeed, one can debate how close the standards employed by the ECtHR were to those of IHL in that case.[161] Yet, from the perspective of Bill Bowring this approach actually made a practical difference in the burden and standard of proof and the evidential issues.[162] Under the ICC Statute, he explains, launching an intentional attack with the knowledge that incidental loss of civilian life will ensue will constitute a war crime only if it can be established that it was "clearly excessive in relation to the concrete and direct overall military advantage anticipated" (Art. 8(2)(iv)). This implies a high evidentiary burden of recklessness. In contrast, under IHRL, there is a presumption that a State will do what it can to protect the lives of civilians. This argument by Bowring is persuasive. The reference to 'normal legal background' does make actual difference. The conclusion to be made here from this is that the derogation provision serves as an effective reference point and hence presents a real incentive against watering down human rights provisions for the times of peace. In that sense it resolves the dilemma in favour of applying the IHRL in NIAC as long as it provides a higher protective standard.

Resort to the principle of best protection would also not lead to the destruction of the IHL regime. To begin with, there is nothing in international law that would deny States the right to subject themselves to higher protective standards than those of CA 3 and AP II. When it is IHRL that provides a higher standard of protection in a given case, choosing not to use the standard of IHL regime does not water down its provisions. It is simply a case of a specific country applying a higher protective standard as it flows from more stringent obligations under human rights treaty that it ratified. As long as the court makes clear that it is applying IHRL and not IHL in that specific circumstance, the IHL regime remains intact.[163] In case where this is to be done by a court whose jurisdiction is not restricted to IHRL (e.g., ICJ or domestic courts), the court must first recognize that there is a norm conflict and that this norm conflict can not be accommodated through interpretative means.

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[160] Melzer (2008) 391.

[161] See, e.g., Abresch (2005).

[162] Bowring (2010) 492-493.

[163] Cassimatis (2007) 633.

It can only be resolved and the principle of best protection is one possible way of justifying the resolution.

In conclusion, since the principle of best protection does not necessarily imply destruction of either the IHL or the IHRL regime, it passes the test.

4 Conclusion: Result of the Viability Assessment

That the IHL and IHRL regimes are applicable at the same time is today uncontested although how exactly is this relationship to be managed is still a matter of contention. One of the most contentious principles that were advanced is the principle of best protection. The analysis here illustrated, albeit very briefly, that the principle is not well supported as *lex lata*. Indeed there are various valid concerns when it comes to implications of the principle. The main part of the thesis (the second section of the chapter 4) tested the principle against four requirements. These were (i.) compliance requirement, (ii.) specificity requirement, (iii.) simplicity requirement and (iv.) integrity requirement.

The results show that the principle of best protection is not viable for IAC situations. Compliance incentives on both the systemic and the normative level would break down. Namely, the reciprocity system would cease to exist while the application of the highest standard of detention would lead to destruction of the prisoner of war regime which would further create incentive to kill rather than capture. Hence, although the standard of protection would be 'best' on paper, in practice it would not provide any protection at all. Furthermore, the line between the *jus ad bellum* and *jus in bello* would become blurred and reintroduce just war doctrine. The principle of best protection therefore does not pass the viability test.

However, as far as non-extraterritorial NIAC situations are concerned, the analysis shows that the application of the principle of best protection is viable. Compliance would not decrease (there are actually reasons to believe that it would increase); clarity of norms would actually improve; the problem of normative complexity could be resolved by resort to derogation; and integrity of both the IHL and IHRL would not be threatened.

The issue of extra-territorial military operations, on the other hand, is more problematic due to the fact that the issue of extraterritorial derogations remains unresolved. As far as the use of force is concerned, the principle of best protection could not operate in favour of IHRL because, at least under ECHR, the regime would remain inapplicable to

most cases. As was mentioned in the chapter 3, this is because the latest case law does not consider that there is "jurisdiction" unless the person in question is in custody. With respect to the rest of human rights, application of more demanding standards of IHRL even under very difficult and hostile environment would be unrealistic unless some acceptable possibility for limitations of obligations is provided.

4.1 Directions for Further Research

There are other proposed solutions to solve the IHL-IHRL interaction than the principle of best protection the viability of which should also be evaluated. The other three proposed solutions are the *lex specialis* principle, complementarity theory, and human-rights based theory. Employing a single viability test to all four solutions would enable easier comparison as to respective implications and facilitate thereby ongoing discussions on this hotly debated topic.

References

List of Judgements/Decisions

Abella	Inter-American Commission on Human Rights, Washington, D.C., United States, 18 November 1997
Akayesu	International Criminal Tribunal for Rwanda, Arusha 2 September 1998
Al-Skeini	Court of Appeal (UK), London, 21 December 2005
Al-Skeini	European Court of Human Rights, Strasbourg, 7 July 2011
Al-Jedda	European Court of Human Rights, Strasbourg, 7 July, 2011
Bankovic	European Court of Human Rights, Strasbourg 19 December 2001
Burgos	UN Human Rights Committee 29 July 1981
Chahal,	European Court of Human Rights (1996)
Coard	Inter-American Commission on Human Rights, Washington, D.C., United States 29 September 1999
Congo	International Court of Justice, Hague, 19 December 2005
G v UK and Ireland	European Commission of Human Rights Strasbourg, 1985
Haradinaj	International Criminal Tribunal for former Yugoslavia, Hague, 3 April 2008
H.C. M. A. [name deleted] v. The Netherlands	UN Human Rights Committee, 3 April 1989

Hilal	European Court of Human Rights, Strasbourg, 6 March 2001
Ilaşcu	European Court of Human Rights, Strasbourg, 12 July 2004
Isayeva	European Court of Human Rights, Strasbourg, 24 February 2005
Isayeva et al.	European Court of Human Rights, Strasbourg, 24 February 2005
Issa	European Court of Human Rights, Strasbourg, 16 November 2004
Kunarac	International Criminal Tribunal for former Yugoslavia, Hague, 12 June 2002
Limaj	International Criminal Tribunal for former Yugoslavia, Hague, 30 November 2005
Ireland v. The United Kingdom	European Court of Human Rights, Strasbourg, 18 January 1978
Loizidou Preliminary Objections	European Court of Human Rights, Strasbourg, 23 March 1995
Nuclear Weapons	International Court of Justice, Hague, 8 July, 1996
North Sea Continental Shelf Cases	International Court of Justice, Hague, 1969
Velasquéz-Rodríguez v. Honduras	Inter-American Court of Human Rights, San José, 18 July 1988
Öcalan	European Court of Human Rights, Strasbourg, 12 May 2005
Soering,	European Court of Human Rights, Strasbourg, 7 July, 1989

Tadic Jurisdiction	International Criminal Tribunal for former Yugoslavia, Hague, 2 October 1995
Wall	International Court of Justice, The Hague, 9 July 2004

Treaties/Main Documents

AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), Geneva, 8 June 1977
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984) 1465 UNTS 85
CRC	Convention on the Rights of the Child (Adopted and open for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989) 1577 UNTS 3
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949

GC II	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Geneva, 12 August 1949
GC III	Geneva Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949
GC IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949
ICC Statute	Rome Statute of the International Criminal Court Rome, 17 July 1998
ICCPR	International Covenant on Civil and Political Rights (Adopted and open for signature, ratification and accession by General Assembly resolution 2200A) (XXI) of 16 December 1966) 999 UNTS 171
ICJ Statute	Statute of the International Court of Justice, 18 April 1946
ILC Draft Articles on State Responsibility	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1
UDHR	Universal Declaration of Human Rights, UN GA/RES/217 A (III), 10 December 1948
UN Charter	Charter of the United Nations, San Francisco 24 October 1945, 1 UNTS XVI
VCLT	Vienna Convention on the Law of Treaties (adopted and open for signature, ratification and accession General Assembly resolutions 2166 (XXI) of 5

December 1966 and 2287 (XXII) of 6 December 1967) 1155 UNTS 331

Other Documents

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana

Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1976, Official Records, Vol. IX, CDDH/I/SR.64

International Conference on Human Rights, 1968, *Human Rights in Armed Conflicts*, Resolution XXIII, Teheran

ICRC, 1948, *Seventeenth International Red Cross Conference*, Report, Stockholm

ICRC, 1995, Statement at the Humanitarian Liaison Working Group

ICRC, 2003 *International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence*, Summary Reprot, XXVIIth Round Table on Current Problems of International Humanitarian Law, San Remo, Italy

ICRC, 2009, *Interpretative Guidance on the Notion of Direct Participation in Hostilities*, (by Melzer, N.)

ILC, 1949, *Yearbook of the International Law Commission*

UN Commission on Human Rights, 1998, UN Doc. E/CN.4/1998/87

UN General Assembly, 1979, *Code of Conduct for Law Enforcement Officials*, GA Res. 34/169, annex, 34 UN GAOR Supp. (No. 46) at 186, UN Doc. A/34/46

UN General Assembly, 1967, Resolution 2252

UN General Assembly, 1968, Resolution 2444, *Declaration on Respect for Human Rights in Armed Conflicts*, UN Doc. A/743

UN General Assembly, 1970, Resolution 2675

UN General Assembly, 2003, Resolution 58/96

UN General Assembly, 2003, Resolution 58/99

UN Human Rights Committee, 1992, CCPR General Comment No. 20

UN Human Rights Committee, 2001, CCPR General Comment No. 29

UN Human Rights Committee, 2004, CCPR General Comment No. 31

UN Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law, 1999, UN Doc. ST/SGB/1999/13

UN Security Council, 1996, Resolution 1041

UN Security Council, 2000, Resolution 1325 [on the protection of women in armed conflict]

UN Security Council, 2009, Resolution 1894 [on the protection of civilians in armed conflict]

UN Security Council, 2011, Resolution 1998 [on the protection of children in armed conflict]

US Government Counterinsurgency Guide, 2009

US Military Counterinsurgency Manual, 2006

Turku Declaration, *Declaration of Minimum Humanitarian Standards*, 1991, UN Doc. E/CN.4/Sub.2/1991/55

Secondary Sources:

Abresch, W., 2005, "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya" *European Journal of International Law*, Vol. 16, No. 4, pp. 741-767

Allain, J., 2001, "The jus cogens Nature of non-refoulement" *International Journal of Refugee Law*, Vol. 13, No. 4, pp. 533-558

Beck, D., Vite, S., 1993 "International Humanitarian Law and Human Rights Law" International Review of the Red Cross, Vol. 33, No. 293, pp. 94-119

Bowring, B., 2010, "Fragmentation, *Lex Specialis* and the Tensions in the Jurisprudence of the European Court of Human Rights" *Journal of Conflict and Security Law*, Vol. 14, No. 3, pp. 485-498

Brierly, J., 1963, *The Law of Nations* (6th ed.), Oxford: Oxford University Press

Brownlie, I., 2008, *Principles of Public International Law* (7th ed.), Oxford: Oxford University Press

Brownlie, I., Goodwin Gill, G., (eds.), 2010 *Brownlie's Documents on Human Rights* (6th ed.), Oxford: Oxford University Press

Campanelli, D., 2008, "The law of military occupation put to the test of human rights law" International Review of the Red Cross, Vol. 90, No. 871, pp. 653-668

Cassese, A., 2005, *International Law* (2nd ed.), Oxford: Oxford University Press

Cassimatis, A., 2007, "International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law" *International and Comparative Law Quarterly*, Vol. 56, No. 3, pp. 623-640

Clapham, A., 2006, "Human rights obligations of non-state actors in conflict situations" *International Review of the Red Cross*, Vol. 88, No. 863, pp. 491-523

Dahl, A., 2003 *Håndbok i militær folkerett*, Oslo: Cappelen

Debuf, E., 2009, "Expert meeting on procedural safeguards for security detention in non-international armed conflict" *International Review of the Red Cross*, Vol. 91, No. 876, pp. 589-881

Dinstein, Y., 2004, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge: Cambridge University Press

Draper, G., 1979, "Humanitarian Law and Human Rights" *Acta Juridica*, pp. 193-206

Droege, C., 2007, "The Interplay Between international Humanitarian Law and International Human Rights Law in Situations of Armed Conflict" *Israel Law Review*, Vol. 40, No. 2, pp. 310-355

Eden, P., Happold M., 2010, "Symposium: The Relationship between International Humanitarian Law and International Human Rights Law" *Journal of Conflict & Security Law*, Vol. 14 No. 3, pp. 441–447

Eide, A., 1984, "The laws of war and human rights – Differences and convergences" in Swinarski, C. (ed.), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Picket*, Hague: Martinus Nijhoff Publishers, pp. 675-697

Eide, A., Rosas, A., Meron, T., 1995, "Combating Lawlessness in Grey Zone Conflicts Through Minimum Humanitarian Standards" *American Journal of International Law*, Vol. 89, No. 1, pp. 215-223

Feinstein, B., 2005, "The Applicability of the Regime of Human Rights in Times of Armed Conflict and Particularly to Occupied Territories: The Case of Israel's Security Barrier" *Northwestern Journal of International Human Rights*, Vol. 4, No. 2, pp. 238-302.

Fischer-Lescano, A., Teubner, G., 2004, "Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law" *Michigan Journal of International Law*, Vol. 25, No. 4, pp. 999-1046

Fleck, D., (ed.), 2008, *The Handbook of International Humanitarian Law* (2nd ed.), Oxford: Oxford University Press

Gross, O., Aoláin, F., 2006, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge: Cambridge University Press

Hafner, G., 2000, "Risks Ensuing from Fragmentation of International Law" Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10), Annex

Hayashi, N., 2010, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law" *Boston University International Law Journal*, Vol. 28, No. 39, pp. 39-140

Henckaerts, J., Beck, L., 2009, *Customary International Humanitarian Law: Volume I Rules*, Cambridge: Cambridge University Press

Jenks, W., 1953, "The Conflict of Law-Making Treaties" *British Yearbook of International Law*, Vol. 30, pp. 401-453

Junod, S., 1983, "Additional Protocol II: History and Scope" *The American University Law Review*, Vol. 33, No. 29, pp. 29-40

Klabbers, J., Peters, A., Ulfstein, G., 2009, *Constitutionalization of International Law*, Oxford: Oxford University Press

Kolb, R., 1998, "The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions" *International Review of the Red Cross*, Vol. 38, No. 324, pp. 409-419

Koller, D., 2005, "The Moral Imperative: Toward a Human Rights-Based Law of War" *Harvard International Law Journal*, Vol. 46, No. 1, pp. 231-264

Koskenniemi, M., 2000 "General Principles. Reflections on Constructivist Thinking in International Law" in Martti Koskenniemi (ed.), *Sources of International Law*, London: Ashgate, pp. 359-399

Koskenniemi, M., 2006, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law" Report of the Study Group of the International Law Commission', U.N. Doc. A/CN.4/L.682

Koskenniemi, M., 2009, "The Politics of International Law – 20 Years Later" *European Journal of International Law*, Vol. 20, No. 1, pp. 7-19

Larsen, K., 2010 *The European Convention on Human Rights and UN-Mandated Peace Operations: A Square Peg in a Round Hole?* Dissertation submitted to the Faculty of Law, University of Oslo

Lindroos, A., 2005, "Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis" *Nordic Journal of International Law*, Vol. 74, No. 1, pp. 27-66;

Lubell, N., 2005, "Challenges in applying human rights law to armed conflict" *International Review of the Red Cross*, Vol. 87., No. 860, pp. 737-754

Marceau, G., 2001, "Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties" *Journal of World Trade*, Vol. 35, No. 6, pp. 1081-1131

McCarthy, C., 2008, "Legal Conclusion or Interpretative Process? *Lex Specialis* and the Applicability of International Human Rights Standards" in: Arnold, R., Quénivet, N., (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, Leiden: Martinus Nijhoff Publishers, pp. 101-118

McLaughlin, R., 2010, "The Law of Armed Conflict and International Human Rights Law: Some Paradigmatic Differences and Operational Implications" Yearbook of International Humanitarian Law, Vol. 13, pp. 213-243

Melzer, N., 2008, *Targeted Killing in International Law*, Oxford: Oxford University Press

Melzer, N., 2010 "Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities" in Gill, T., Fleck, D., (eds.), *The Handbook of the International Law of Military Operations*, Oxford: Oxford University Press, pp. 33-49

Meron, T., 2000, "The Humanization of Humanitarian Law" *American Journal of International Law*, Vol. 94, No. 2

Meyrowitz, H., 1994, "The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977" International Review of the Red Cross, Vol. 34, No. 299, pp. 98-122

Michaels, R., Pauwelyn , J., 2011, "Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of Public International Law" in Brouder, T., Shany, Y., (eds.), *Multi-Sourced Equivalent Norms in International Law*, Oxford: Hart, pp. 19-42

Milanovic, M., 2009, "Norm Conflict in International Law: Whither Human Rights?" *Duke Journal of Comparative & International Law*, Vol. 20, No. 1, pp. 69-131

Milanovic, M., 2010, "Norm Conflicts, International Humanitarian Law and Human Rights Law" *Journal of Conflict and Security Law*, Vol. 14, No. 3, pp. 459-483

Milanovic, M., 2011, *Extraterritorial Application of Human Rights Treaties*, Oxford: Oxford University Press

Naftali, O., Michaeli, K., 2003, "'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings" *Cornell International Law Journal*, Vol. 36, No. 2, pp. 233-292

Ober, J., 1994, "Classical Greek Times", in Howard, M., Andreopoulos, G., Shulman, M., (eds), *The Laws of War: Constraints on Warfare in the Western World*, New Haven: Yale University Press

Oppenheim, L., 1955, *International Law: a Treatise* (8th ed.), London: Longman

Orakhelashvili, A., 2008, "The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?" European Journal of International Law, Vol. 19, No. 1, pp. 161-182

Pauwelyn, J., 2009, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law*, Cambridge: Cambridge University Press

Provost, R., 2000, *International Human Rights and Humanitarian Law*, Cambridge: Cambridge University Press

Prud'homme, N., 2007 "Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?" *Israel Law Review*, Vol. 40, No. 2, pp. 355-395

Quénivet, N., 2008, "The History of the Relationship Between International Humanitarian Law and Human Rights Law" in Arnold, R., Quénivet, N., (eds.) *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, Leiden: Martinus Nijhoff Publishers, pp. 1-12

Roberts, A., Guelff, R., (eds.), 2000, *Documents on the Laws of War* (3rd ed.), Oxford: Oxford University Press

Sandoz, Y., Swinarski, C., Zimmermann, B., (eds.), 1987, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva: ICRC

Sassoli, M., 2005, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers" *European Journal of International Law*, Vol. 16, No. 4, pp. 661-694

Sassoli, M., Bouvier, 2006, A., *How Does Law Protect in War?* (2nd ed.), Vol. 1, Geneva: ICRC

Sassoli, M., 2007, "Ius ad Bellum and Ius in Bello – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?" in Schmitt, M., Pejic, J., (eds*.) International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein*, Leiden: Brill, pp. 241-264

Sassoli, M., Olson, L., 2008, "The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts" *International Review of the Red Cross*, Vol. 90, No. 871, pp. 599-627

Schabas, W., 2007, "*Lex Specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and The Law of Armed Conflict, and the Conundrum of Jus ad Bellum" *Israel Law Review*, Vol. 40, No. 2, pp. 592-613

Schindler, D., 2003, "International Humanitarian Law: Its remarkable Development and its Persistent Violation" *Journal of the History of the International Law*, Vol. 5, No. 2, pp. 165-188

Schmitt, M., 2010, "Targeting in Operational Law" in Gill, T., Fleck, D., (eds.) *The Handbook of the International Law of Military Operations*, Oxford: Oxford University Press, pp. 245-275

Shaw, M., 2008 *International Law* (6th ed.), Cambridge: Cambridge University Press

Simma, B., Pulkowski, D., "*Leges Speciales* and Self-Contained Regimes" 2010, in Crawford, J., Olleson, S., Pellet, A. (eds.), *The Law of International Responsibility*, Oxford: Oxford University Press, pp. 139-163.

Slaughter, A., Ratner, S., 1999, "Appraising the Methods of International Law: A Prospectus for Readers" *The American Journal of International Law*, Vol. 93, No. 2, pp. 291-423

Verdirame, G., 2008, "Human Rights in Wartime: A Framework for Analysis" *European Human Rights Law Review*, Vol. 6, pp. 689-705

Vinuesa, R., 1998, "Interface, Correspondence, and Convergence of Human Rights and International Humanitarian Law" *Yearbook of International Humanitarian Law*, Vol. 1, pp. 69-110

Vranes, E., "The Definition of 'Norm Conflict' in International Law and Legal Theory" *European Journal of International Law*, Vol. 17, No. 2 (2006), pp. 395-418

Watkin, K., 2004, "Controlling the Use of Force: a Role for Human Rights Norms in Contemporary Armed Conflict" *American Journal of International Law*, Vol. 98, No. 1

Watkin, K., 2005, "Humans in the Cross-Hairs: Targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict" in Wippman, D., Evangelista, M. (eds.), *New Wars, New Laws? : Applying the Laws of War in 21st Century Conflicts*, Ardsley, N.Y.: Transnational Publishers, pp. 137-179

Zegveld, L., 2002, *Accountability of Armed Opposition Groups in International Law*, Cambridge: Cambridge University Press